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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

MANUEL ESCOBEDO, MARTHA I. ESCOBEDO, GARY IVORY, ANTHONY PICKETT, and MICHAEL ROSS,
Petitioners,

v.

CONOCO, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether disclaimer language, as a matter of national public policy, can insulate a franchisor who operates a nationwide system of stores that are places of public accommodation from liability under 42 U.S.C. §§ 1981 and 2000a for racial discrimination against customers at its franchise stores, when the franchise agreement and federal law give the franchisor the right to control the franchise store and when the franchisor has communicated this right and ability to the public.

2. Whether the Fifth Circuit erred in affirming summary judgment against Petitioners by holding that disclaimer language in a franchise agreement shields franchisors as a matter of law from claims under 42 U.S.C. §§ 1981 and 2000a of race discrimination by franchisees when the Fifth Circuit failed to consider the evidence as a whole, assumed evidence not in the record, failed to draw all reasonable inferences from the evidence in Petitioners' favor, and misconstrued Petitioners' burden at the summary judgment stage.

LIST OF PARTIES AND RULE 29.6 LIST

The parties before the Court of Appeals included Denise Arguello, Alberto Govea, and the parties listed in the caption. Mrs. Arguello and Mr. Govea are not seeking certiorari and are therefore not listed as Petitioners. To Petitioners' knowledge, Conoco, Inc. has no parent companies or non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully submit this petition for writ of certiorari to review the opinion and order of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on April 10, 2000.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 207 F.3d 803. The opinion of the United States District Court is unpublished but available through Westlaw at 1998 WL 713277. Copies of both opinions are contained in the Appendix attached hereto.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit by writ of certiorari after rendering judgment. The decision for which review is sought was entered on April 10, 2000. Pursuant to this Court's Rule 13.1, this petition for writ of certiorari is timely because it is being filed within ninety days after entry of the judgment.

STATUTES INVOLVED

The case involves claims of racial discrimination under 42 U.S.C. §§ 1981 and 2000a. Petitioners are former customers at Conoco-branded stores, which are owned and operated according to Petroleum Marketer Agreements ("PMAs") between Conoco and its marketers. The relationship between Conoco and its branded marketers is governed by the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2801, *et seq.* Relevant portions of 42 U.S.C. §§ 1981 and 2000a and relevant portions of the PMPA are set forth below:

42 U.S.C. § 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 2000a

(a) Equal access

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings, facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments.

Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and

(B) which holds itself out as serving patrons of such covered establishment.

(c) Operations affecting commerce; criteria; "commerce" defined

The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

15 U.S.C. § 2802

(a) General prohibition against termination or nonrenewal

Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may

(1) terminate any franchise (entered into or renewed on or after June 19, 1978) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

(b) Precondition and grounds for termination or nonrenewal

(1) Any franchisor may terminate any franchise (entered into or renewed on or after June 19, 1978) or may fail to renew a franchise relationship, if —

(A) the notification requirements of section 2804 of this title are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision in the franchise, which provision is both reasonable and of material significance to the franchise relationship. . . .

. . .

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable. . . .

. . .

(c) Definition

As used in subsection (b)(2)(C) of this section, the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as —

. . .

(11) knowing failure of the franchisee to comply with Federal, State, or local laws or regulations relevant to the operation of the marketing premises; . . . .

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

This case involves allegations of racial discrimination under 42 U.S.C. §§ 1981 and 2000a. Petitioners are all former customers of Conoco-branded stores[1] and were subjected to racial discrimination while attempting to receive service at those stores.

Petitioners filed their initial Complaint on March 24, 1997 asserting, among other things, causes of action under 42 U.S.C. §§ 1981 and 2000a. Petitioners filed

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[1] The phrase "Conoco-branded stores" and/or "branded stores" refers to stores that are owned and operated by marketers pursuant to Petroleum Marketer Agreements ("PMAs") between the marketers and Conoco, Inc.

various amendments to that Complaint. Petitioners filed a Fourth Amended Complaint on March 30, 1998, asserting claims under §§ 1981 and 2000a. On July 27, 1998, Conoco filed a Motion for Summary Judgment seeking dismissal of Petitioners' claims. The district court granted Conoco's motion and entered summary judgment against Petitioners in its Judgment and Memorandum Opinion and Order on October 8, 1998.

Petitioners appealed the district court's Order to the United States Court of Appeals for the Fifth Circuit, and following oral argument, a three-judge panel of the Fifth Circuit affirmed in part and reversed in part the judgment of the district court.[2]

The district court had jurisdiction over Petitioners' claims under 28 U.S.C. §§ 1331 and 1343.

B. Factual Background

1. Racial Discrimination Against Petitioners

a. The Escobedos

Petitioner Manuel Escobedo and his wife, Petitioner Martha I. Escobedo, are Hispanic. In November, 1996, the Escobedos and other members of their family stopped at a Conoco-branded store in San Marcos, Texas. While they were there, the store clerk called Mrs. Escobedo a "mother-f***ing bitch," told her to "get out of the store — we don't want you here," told Mr. Escobedo to "get the

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[2] The Fifth Circuit reversed the district court's judgment as to Denise Arguello's and Alberto Govea's claims against a Conoco-owned store and affirmed the judgment on Petitioners' claims involving Conoco-branded stores.

hell out of his station," and told him that "you Mexicans need to go back to Mexico."

At a Conoco-branded store in Grand Prairie, Texas, a store clerk told Mr. Escobedo that he had to pre-pay for gas because "you people steal gas."

At two Conoco-branded stores in Laredo, Texas, Mr. Escobedo has consistently been asked to pre-pay for gas when white customers have not been asked to pre-pay.

b. Ivory, Pickett, and Ross

Petitioners Ivory, Pickett, and Ross are African-American. In September, 1995, at a Conoco-branded store in Fort Worth, Texas, a store clerk treated them as though they were suspected of theft, told them "we don't have to serve you people" and "you people always act like this," and refused them service until they called the police and the police ordered the clerk to allow them to make a purchase.

2. Conoco's Petroleum Marketer Agreements ("PMAs") with Branded Stores

Conoco has a system of both Conoco-owned stores and Conoco-branded stores which are operated pursuant to Petroleum Marketer Agreements ("PMAs"). The Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2801, *et seq.*, governs these PMAs and the relationship between Conoco and its marketers. The majority of stores within the Conoco system are branded stores. In Texas alone, there are 697 Conoco-branded stores, compared to only 25 Conoco-owned stores.

Conoco had a PMA with marketers who owned and operated the stores where the incidents involving the

Escobedos, Ivory, Pickett, and Ross occurred. Although some provisions in the PMAs for each marketer differ, the PMAs between Conoco and the marketers of the branded stores involved in this case are remarkably similar.[3] Relevant portions of these PMAs provide the following:

- Each PMA requires the marketer to "conduct its independent business operations consistent with the standards" set forth in the PMAs in order to "promote the continuing good reputation of Conoco and all other Conoco marketers."
- Each PMA requires the marketer to treat all customers "fairly, honestly, and courteously."
- Each PMA requires the marketer to "conduct its operation to provide efficient, courteous, and intelligent service to retail dealers and other customers" and to "permit such inspection of [its] business operations by Conoco . . . as may reasonably be required to determine whether [the branded store] is in compliance" with the PMA.
- Each PMA requires the marketer to satisfy several Conoco standards, including displaying a Conoco capsule sign visible to the public and displaying and selling Conoco motor oils.

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[3] Because the Fifth Circuit affirmed summary judgment against Petitioners because of the language in the PMAs, the Petitioners are including two PMAs in the Appendix. These PMAs are essential to understand this petition. Portions of the 1993 and 1996 PMAs between Conoco and Classic Group, Inc. are included in the Appendix.

- Each PMA states that the branded store and grounds must be "clean, in good repair, and well maintained."
- Each PMA states that the branded store must be operated with personnel who are well-groomed and wear clean, appropriate apparel.

If the Conoco marketer violates the PMA, and if particular provisions of the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2801, *et seq.*, are satisfied, Conoco can revoke its PMA with that marketer, which is commonly referred to as "debranding." Debranding can occur for a variety of reasons, including volume-related failures, product adulteration, and failure to satisfy Conoco image requirements. In addition to debranding, Conoco may refuse to renew a PMA with a marketer for various reasons, including numerous valid customer complaints.

In order to insure that a marketer satisfies its obligations under the PMA, Conoco conducts an image evaluation program two times per year at Conoco-branded stores. The image evaluation program evaluates the branded stores' compliance with several image requirements, including brand requirements such as customer service, signage and colors, exterior and interior appearance, and cleanliness. These image evaluations are conducted anonymously and without notice. A Conoco branded store can be debranded if it fails the image evaluation. The image evaluation program is a concerted effort by Conoco to diminish the visible differences between Conoco-owned and Conoco-branded stores. The image evaluations encompass every detail of the operation, from the use of Conoco uniforms to the use of the octane rating stickers placed on fuel pumps.

The end result is that consumers are unable to distinguish between Conoco-owned and Conoco-branded stores. This increases Conoco's profits by drawing customers to Conoco-branded stores, which in Texas outnumber Conoco-owned stores 28 to 1.

The PMAs specifically identify the requirement of a marketer to treat customers "fairly, honestly, and courteously" as an image requirement and as one of the standards to be complied with by each marketer.

3. The Nokes Memo

On April 4, 1997, Jim Nokes ("Nokes"), Conoco's Vice President of Refining and Marketing for North America, sent an internal memorandum to Bill Gover ("Gover"), Conoco's Manager for Branded Marketing, North America. This memo discussed "ethnic insults" and discrimination against customers at Conoco-owned and Conoco-branded stores.[4] In the memo, Nokes directed Gover to *"take appropriate action against any employee or business associate* . . . found to have mistreated a customer for any reason *up to and including* termination of an employee *and/or debranding of a store."* (Emphasis added). Nokes also stated that he "want[ed] it understood that *Conoco does not tolerate* [racial discrimination against customers] by employees at any of its *branded stores."* (Emphasis added). Nokes told Gover that *"[a]ll customers* who choose to do business with Conoco have a right to be treated courteously and fairly" and that he has "absolutely no tolerance for behavior outside those expectations." (Emphasis added). Nokes

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[4] This memo is contained in the Appendix because Petitioners believe that this internal memo is necessary to understanding this Petition, especially since the Fifth Circuit completely ignored this evidence in affirming summary judgment against Petitioners.

indicated that the course of action he suggested was *"supported by all of Conoco's senior management, including the CEO."* (Emphasis added). Conoco distributed this memo to the media, thereby conveying the message to the public that Conoco would address and take responsibility for racial discrimination at both its Conoco-owned and Conoco-branded stores.

REASONS FOR GRANTING THE WRIT

This Petition should be granted for several compelling reasons. First, certiorari should be granted because the Fifth Circuit's decision is in conflict with this Court's decisions. Specifically, in reaching its decision, the Fifth Circuit misapplied the summary judgment standard that is set forth in FED. R. CIV. P. 56 and explained in *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51(1986), and, most recently, in *Reeves v. Sanderson Plumbing Products. Inc.*, 2000 WL 743663 (June 12, 2000).[5] The Fifth Circuit failed to consider the evidence as a whole, ignored critical parts of the summary judgment evidence, assumed evidence not in the record, failed to draw all reasonable inferences from the evidence in Petitioners' favor, and misconstrued Petitioners' burden at the summary judgment stage. Second, certiorari should be granted because this case involves an extremely important federal question that has not yet been decided by this Court; that is, whether, in the public accommodations context, a franchisor can avoid liability as a matter of law for racial discrimination against customers by its franchisees. Finally, certiorari should be granted because there is a split among the courts as to two issues: (1) whether

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[5] *Reeves* is to be reported at 120 S.Ct. 2097 once published.

a genuine issue of material fact was created on the agency issue in these circumstances, and (2) whether the existence of an agency relationship is a question of fact or of law.

A. Conflict With Prior This Court's Decisions

Certiorari should be granted because in reaching its decision on the agency issue between Conoco and its branded stores, the Fifth Circuit misapplied the summary judgment standard set forth in FED. R. CIV. P. 56 and explained in this Court's cases construing the rule.

1. Summary Judgment Standard

According to FED. R. CIV. P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." To survive Conoco's motion for summary judgment, Petitioners had to establish a genuine issue of material fact as to the existence of an agency relationship between Conoco, Inc. and the branded stores involved in this case. *See* FED. R. CIV. P. 56(e); *Matsushita*, 475 U.S. at 585-86. Summary judgment is not appropriate "if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Liberty Lobby. Inc.*, 477 U.S. at 248. The judge's inquiry at the summary judgment stage is "the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250. The inquiry is essentially "whether the evidence

presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

In ruling on a motion for summary judgment, the court must consider all of the evidence. *Matsushita*, 475 U.S. at 587 (record must be reviewed "as a whole"). The court must also consider the non-movant's evidence as true and must draw all reasonable inferences from the evidence in favor of the non-movant. *See Liberty Lobby, Inc.*, 477 U.S. at 255, *citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

At the summary judgment stage, the judge is "not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby, Inc.*, 477 U.S. at 249. In doing so, "the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Id.* at 252. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or a directed verdict." *Id.* at 255.

These standards were recently reaffirmed by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 2000 WL 743663 (June 12, 2000) (discussing standard in reviewing motion for judgment as a matter of law under Rule 50 and noting that the standard "mirrors" the summary judgment standard under Rule 56). In *Reeves*, this Court unanimously reversed the Fifth Circuit, finding that the Fifth Circuit "misapplied the standard of review dictated by Rule 50." 2000 WL 743663, *12. The Court noted that the Fifth Circuit

misapplied the standard by "disregard[ing] critical evidence favorable to petitioner," by "fail[ing] to draw all reasonable inferences in favor of petitioner," and by "impermissibly substitut[ing] its judgment concerning the weight of the evidence for the jury's." *Id.*

2. Fifth Circuit's Misapplication of Summary Judgment Standard

Certiorari should be granted in this case because the Fifth Circuit has again misapplied the standards announced by this Court, this time in the context of a motion for summary judgment under Rule 56. As in *Reeves*, the Fifth Circuit in this case disregarded critical evidence favorable to Petitioners, failed to draw all reasonable inferences in Petitioners' favor, and impermissibly substituted its judgment for the jury's judgment on the weight of the evidence. Certiorari should be granted to address this flagrant disregard for the standards previously announced by this Court and recently reaffirmed in *Reeves*.

The evidence Petitioners presented on the issue of agency between Conoco, Inc. and its branded stores included (1) Conoco's right to control the branded stores as set forth in the Petroleum Marketer Agreements ("PMAs"), (2) Conoco's right to control the branded stores as set forth in the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.* ("PMPA"), and (3) Conoco's right and ability to control the branded stores as set forth in the Nokes memo. The Fifth Circuit completely ignored the Nokes memo and the evidence showing Conoco's rights under the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.* ("PMPA"), both of which demonstrate Conoco's right to control the branded stores and which therefore raise a genuine issue of material fact on the agency issue.

The Nokes memo provides powerful evidence of Conoco's ability to control the branded stores and is therefore probative as to the agency issue. As previously discussed, in his memo, Jim Nokes[6] discussed the allegations of ethnic insults and racial discrimination at Conoco-owned and Conoco-branded stores, and in the memo, he directed Bill Gover[7] to *"take appropriate action against any employee or business associate . . .* found to have mistreated a customer for any reason, *up to and including* termination of an employee *and/or debranding of a store."* (Emphasis added). Nokes stated that he "want[ed] it understood that *Conoco does not tolerate* [racial discrimination against customers] by employees at any of its *branded stores."* (Emphasis added). Nokes further stated that *"[a]ll customers* who choose to do business with Conoco have a right to be treated courteously and fairly" and that he has "absolutely no tolerance for behavior outside those expectations." (Emphasis added). Finally, Nokes stated that the course of action outlined in the memo was *"supported by all of Conoco's senior management, including the CEO."* (Emphasis added).

In addition to the Nokes memo, the Fifth Circuit also completely ignored evidence of Conoco's right to control the branded stores as set forth in the Petroleum Marketing Practices Act, ("PMPA"), 15 U.S.C. § 2801, *et seq*. The PMPA gives Conoco the right to control the various

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[6] Again, Nokes was Conoco's Vice President of Refining and Marketing for North America at the time.

[7] Gover was Conoco's Manager for Branded Marketing, North America at the time.

aspects of the branded stores, which could lead a reasonable jury to conclude that an agency relationship exists between Conoco, Inc. and its branded stores. Under 15 U.S.C. § 2802(b)(2), Conoco may terminate and/or fail to renew a PMA for any failure by a branded store to comply with any provision of the PMA, if the provision is reasonable and of material significance to the franchise relationship. In this case, the branded stores violated the PMAs by failing to provide fair, honest, and courteous service to customers. This is of material significance to the franchise relationship, as failure to do so can dramatically affect the branded store's business and Conoco's overall reputation; thus, Conoco could exert control over the branded stores by terminating or failing to renew the PMAs in question. Further, under § 2802(b)(2)(C), Conoco can terminate or fail to renew a PMA based upon "the occurrence of an event which is relevant to the franchise relationship and as a result of which termination . . . or nonrenewal . . . is reasonable," including, but not limited to, a knowing failure of the branded store to comply with federal laws relevant to the operation of the branded store. *See* 15 U.S.C. § 2802(c)(11). Federal law under both 42 U.S.C. §§ 1981 and 2000a prohibits racial discrimination against customers. Such laws are relevant to the operation of the branded store, and Conoco could therefore exert control over the branded stores by terminating or failing to renew the PMAs in question.

In this case, the critical issue affecting the agency question between Conoco, Inc. and its branded stores is whether Conoco had the right to control the branded stores. The Nokes memorandum is probative evidence on this point. It demonstrates the ability and intent to exercise such control from Conoco's highest levels of

management. Conoco's rights under the PMPA also demonstrates Conoco's right to control the branded stores. Both the Nokes memo and Conoco's rights under the PMPA could lead a reasonable fact-finder to conclude that Conoco had the right to control the branded stores. The Fifth Circuit completely ignored this evidence in considering the agency issue between Conoco and its branded stores and thus misapplied the summary judgment standard in affirming summary judgment. *See Reeves*, 2000 WL 743663, *12.

Closely akin to the Fifth Circuit's misapplication of the standard of review by ignoring evidence in the form of the Nokes memo and Conoco's rights under the PMPA, the Fifth Circuit supplied "evidence" that did not exist. Specifically, the Fifth Circuit opined:

> The facts of the present case are similar to the facts which form the basis of the claim in *Neff v. American Dairy Queen Corp.*, 58 F.3d 1063 (5th Cir. 1995).

Arguello, 207 F.3d at 808. The Fifth Circuit then stated:

> "The only summary judgment evidence presented by Neff was the franchise agreement."

Id.

In other words, the facts in *Arguello* were not similar to those in *Neff*, since *Neff* contained no equivalent of the Nokes memo, since the franchise agreements in *Neff* and this case have different control language, and since the plaintiff in *Neff* apparently did not raise any federal statute giving American Dairy Queen Corporation any right to control the franchise store in question.

In addition to ignoring critical evidence and assuming evidence not in the record, the Fifth Circuit also failed to draw from the evidence all reasonable inferences in Petitioners' favor and impermissibly weighed the evidence with respect to the PMAs.[8] First, the Fifth Circuit examined only portions of the PMAs and failed to draw all reasonable inferences from the PMAs in Petitioners' favor. For example, the Fifth Circuit recognized that the PMAs allow Conoco to conduct regular inspections of branded stores; however, instead of drawing an inference in Petitioners' favor that such inspections evidence Conoco's right to control the branded stores, the Fifth Circuit discussed the 'normal focus' of the inspections and surmised that "[c]ustomer service is not considered a main focus of the random inspections." *See Arguello*, 207 F.3d at 807 n.6. Further, although the Fifth Circuit recognized that the PMAs contain 'guidelines' by Conoco, Inc. that the branded stores must follow, *see Arguello*, 207 F.3d at 808, the Court failed to recognize that a reasonable trier of fact could conclude from those 'guidelines' that Conoco, Inc. had the right to control the branded stores and that a principal-agent relationship existed between them.

Second, using *Neff, supra* as precedent, where there was no evidence of agency besides the franchise agreement, the Fifth Circuit treated as dispositive the provision in the PMAs that state that no agency relationship exists, even though this Court has previously held that the fact that an express disclaimer of agency exists between two parties "is not decisive of their relations so

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[8] Obviously, since the Fifth Circuit completely ignored the Nokes memo and the PMPA provisions, the Fifth Circuit failed to draw the reasonable inferences from such evidence in Petitioners' favor.

far as third parties dealing with them upon the basis of their being agents are concerned." *Board of Trade of City of Chicago v. Hammond Elevator Co.*, 198 U.S. 424, 437 (1905). The Fifth Circuit's decision that the disclaimer language in the PMA outweighs all its other language is the same kind of misapplication of the standard of review denounced in *Reeves* where the Fifth Circuit had relied upon evidence that the age discrimination claimants had been cited for poor recordkeeping and the defendant employer had employed many managers over the age of 50. This Court noted that this evidence, although relevant, "is certainly not dispositive." *Reeves*, 2000 WL 743663 at *12.

The Fifth Circuit also misconstrued Petitioners' burden at the summary judgment stage. Petitioners merely had to raise a genuine issue of material fact as to the agency issue. Instead, the Fifth Circuit implicitly held that Petitioners had to conclusively establish the existence of an agency relationship between Conoco, Inc. and its branded stores. The Fifth Circuit stated:

> [t]he language of the PMA, while offering guidelines to the Conoco-branded stores, *does not establish* that Conoco, Inc. has any participation in the daily operations of the branded stores nor that Conoco, Inc. participates in making personnel decisions.
>
> Therefore, *we find* that there is no agency relationship between Conoco, Inc. and the branded stores in question . . .

Arguello, 207 F.3d at 808 (emphasis added). As is evident from this statement, the Fifth Circuit misconstrued Petitioners' burden at the summary judgment stage. By "finding" no agency

relationship because the PMAs purportedly do not "establish" Conoco's participation in certain matters, the Fifth Circuit apparently affirmed summary judgment against Petitioners because they did not conclusively prove their case on the agency issue. Contrary to that misconception, Petitioners merely had to present sufficient evidence which would allow a reasonable factfinder to find that an agency relationship existed. Certiorari should be granted because the Fifth Circuit misapplied the summary judgment standard set forth in FED. R. CIV. P. 56 and explained in *Matsushita, Liberty Lobby, Inc.*, and *Reeves*.

B. Important Federal Question Not Yet Settled by this Court

Certiorari should also be granted because this case involves an important federal question that has not yet been settled by this Court. In prior cases, this Court has indicated that vicarious liability in the civil rights and discrimination context should be determined according to general agency rules. *See, e.g., Burlington Indus., Inc. v. Ellerth*, ___ U.S. ___, 118 S.Ct. 2257, 2265 (1998) (Title VII); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (same); *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 392 (1982) (§ 1981). However, this Court has not yet issued any opinions as to how these general agency rules should be applied either in the public accommodations context and/or in the context of a franchisor/franchisee relationship.

If certiorari is granted here, the Court will determine the appropriate standards governing vicarious liability of a franchisor for discrimination by its franchisees in places of public accommodations. This Court should

grant certiorari and address this issue because of the critical importance this question has upon the future of civil rights in public accommodations in America. This is a nation of franchise stores. Due to the overwhelming number of franchise operations throughout America,[9] the practical effect of a refusal to grant certiorari will be that for many, if not most, consumer transactions in places of public accommodation, customers will have essentially no protection against racial discrimination, for companies can insulate themselves from liability for such discrimination simply by serving the public through a system of franchise stores. If certiorari is denied, discrimination-free public accommodations envisioned by Congress will be more difficult, but franchisor companies will have the best of both worlds: like Conoco, they can enforce standards (to their economic benefit) so the public will not know the difference between a Conoco-owned and a Conoco-branded store; they can put out announcements to the public about how Conoco will not tolerate discrimination at any of its businesses, including franchise operations; yet they will rest beyond the reach of the law when discrimination is practiced at their franchise store.

Civil rights laws were originally introduced in order to "give effect to [the declaration that all persons in the United States should be free] and [to] secure to all persons within the United States practical freedom." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 431-32 (1968) (quoting Cong. Globe, 39th Cong. 1st Sess., 1115-

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[9] Even considering only Conoco's stores in Texas, the disparity in number between the Conoco-owned stores and the Conoco-branded stores is staggering. In Texas alone, there are approximately 697 Conoco-branded stores and only 25 Conoco-owned stores, a ratio of approximately 28 to 1.

1124 and 1151-1155, statement by Senator Trumbull). Senator Trumbull, who introduced the Civil Rights Act of 1866 (upon with § 1981 is based), explained that "[t]here is very little importance in the general declaration of abstract truth and principle [that all persons be free] unless the persons who are to be affected . . . have some means of availing themselves of their benefits." *Id.*

Congress intended public accommodations laws to be sweeping in scope, as Title II applies to "any place of public accommodation," which includes, in part, any gasoline station whose operations affect commerce. 42 U.S.C. § 2000a(b)(2). Even if the business was a small "mom-and-pop" operation, it would fall within Congress' proscription against racial discrimination against customers under Title II. The breadth of Congress' protections under Title II is even more evident when compared to the protections under Title VII, which was also enacted as part of the Civil Rights Act of 1964. Under Title VII, Congress specifically excepted the small "mom-and-pop" type operations. *See* 42 U.S.C. §2000e(b) (as originally enacted, employer had to have at least 25 employees before being subject to Title VII). Contrary to the intended breadth of public accommodations laws, a refusal to grant certiorari will essentially turn Title II on its head, for large companies will be able to avoid liability simply by operating through a franchise system, while small "mom-and-pop" type operations will still be subject to liability.

Both §§ 1981 and 2000a should be interpreted to give practical effect to the right to be free from racial discrimination in places of public accommodations. Given the reality of business operations in America today, if the Fifth Circuit's decision is allowed to stand, there will be no real protections in the public accommodations context, and indeed, "the fundamental precept on which

our country is based — 'that all men are created equal" — [will be] a sham." *See United States v. Glass Menagerie, Inc.*, 702 F. Supp. 139, 142 (E.D. Ky. 1988).

If certiorari is refused, the guarantee of equal treatment in public accommodations will be simply an illusion and an empty promise for many consumers, as Conoco and its branded stores (not to mention all other oil companies and their franchisees, or for that matter, all other large corporations who operate a nationwide franchise system) will simply avoid liability by doing what they do already — serving the public through low-level employees at branded stores, and then arguing that the acts of the employees at those stores do not bind the company. Perhaps because of the apparently sweeping scope of public accommodations laws, or perhaps just for publicity, the Nokes memo shows that Conoco chose to tell the world, through the media, that all of Conoco's senior management, including the CEO, intended to take appropriate action against any employee or business associate found to have mistreated a customer and that Conoco does not tolerate racial discrimination against customers by employees at any of its branded stores. Unless certiorari is granted, the Fifth Circuit puts Conoco and other employers on notice that it can save the speeches and disregard racial discrimination at franchise stores, or, more cynically, it can put out such statements to the press, to further fool the public, but that the statements mean nothing. This Court should grant certiorari so that the Court can more fully examine the Fifth Circuit's decision and its devas-

tating impact on the future of civil rights laws in public accommodations in America.[10]

C. Conflict Among Courts

Finally, certiorari should also be granted because there is a split in the courts as to two issues: (1) whether a genuine issue of material fact was shown as to the agency issue in these circumstances, and (2) whether the agency issue is a question of fact or of law.

1. Whether Genuine Issue of Material Fact Shown

There is a split between the Fifth Circuit, the Third Circuit, and the New Mexico Supreme Court as to whether a genuine issue of material fact on the agency issue was created based upon the evidence presented in this case. In this case, the Fifth Circuit concluded that there was no genuine issue of material fact as to the existence of an agency relationship between Conoco, Inc. and its branded stores. The Fifth Circuit's decision is in conflict with the Third Circuit's decision in *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781 (3rd Cir. 1978) and with the New Mexico Supreme Court's decision in *Chevron Oil Co. v. Sutton*, 515 P.2d 1283 (N.M. 1973).

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[10] The Fifth Circuit's decision implicates other issues, although they are not at issue in this particular case. For example, the Fifth Circuit's decision may affect franchisors' vicarious liability in the Title VII context or in the public accommodations context of the Americans with Disabilities Act. This Court should grant certiorari because of the important federal question involved in this particular case as well as these other important federal questions implicated by the Fifth Circuit's decision.

In *Drexel*, a widow brought a wrongful death action against the Union Prescription Centers, Inc. arising from the death of her husband after he received and consumed an incorrect prescription medication from one of UPC's franchisees. The district court granted summary judgment against the widow, and the widow appealed. The Third Circuit reversed, stating that "it cannot be determined as a matter of law on the present record that UPC did not have the right to control the manner of [the franchisee's] performance or that UPC was not the 'master' of [the franchisee]." *Drexel*, 582 F.2d at 788. The Third Circuit explained:

> When a franchisee is required . . . to perpetuate 'quality standards,' . . . to maintain the premises and equipment in an 'attractive condition,' to ensure a 'high degree of cleanliness' and a 'neat, orderly arrangement' of merchandise, to conform all equipment and facilities to [franchisor's] 'national standards,' to adhere strictly to [franchisor's] 'uniformly high standards of service, appearance, quality of equipment and proved methods of operation,' and to conduct his business in a manner that will reflect favorably at all times upon [franchisor],' and when the franchisor has the 'unqualified right' to review the store's operations and to inspect the store 'to assure maintenance of [franchisor's] high standards . . . , the goodwill of the public, and compliance with the provisions of [the agreement] ... as well as the right to terminate the relationship for breach of any provision of the [agreement], *we believe that reasonable minds could differ as to whether or not [franchisor] had the right to control [franchisee's] physical conduct and the manner in*

> *which he operated the store, including the prescription-filling activity.*

Drexel, 582 F.2d at 789 (emphasis added).

In *Chevron Oil Co. v. Sutton*, 515 P.2d 1283 (N.M. 1973), a widower brought a wrongful death action against Chevron and its lessee for his wife's death that resulted from a negligent vehicle repair at the lessee's station. The trial court had granted summary judgment against the widower, and the appeals court reversed. In considering whether summary judgment was appropriate on the agency issue, the New Mexico Supreme Court held that summary judgment was not appropriate, stating that a "substantial dispute as to a material fact" existed, thereby foreclosing summary judgment. *Id.* at 1286. The court based its decision, in part, on the fact that the lessee was required to keep the facilities in a "'clean and orderly condition,'" and to "present a 'good appearance'" and on the fact that lessee "sold Chevron products and dispensed gasoline and oil provided by Chevron," "received the benefit of Chevron advertising," and its employees wore "work uniforms containing the Chevron emblem." *Id.*

The facts in this case are strikingly similar to the facts presented in both *Drexel* and *Sutton*, yet the Fifth Circuit reached the opposite conclusion. Certiorari should be granted to address the split between the courts on this issue.

2. Question of Fact or Law

Certiorari should also be granted because there is a split among the circuits as to whether the agency issue is a question of fact or of law.

The overwhelming majority of the courts of appeals have indicated that the question of agency is a fact issue to be submitted to the jury. *See, e.g., Chemtool, Inc. v. Lubrication Technologies, Inc.*, 148 F.3d 742, 745 (7th Cir. 1998) ("the existence and scope of an agency relationship are questions of fact, to be decided by the trier of fact"); *Ward v. Mgmt. Analysis Co. Employee Disability Benefit Plan*, 135 F.3d 1276, 1283 (9th Cir. 1998); *aff'd in part, rev'd in part on other grounds*, 526 U.S. 358 (1999) ("existence of an agency relationship generally presents a question of fact"); *Cabrera v. Jakabovitz*, 24 F.3d 372, 386 (2nd Cir. 1994) (question of agency should be submitted to jury unless facts are insufficient to support a finding or there is no dispute as to historical facts); *Sun Bank, N.A. v. E.F Hutton & Co., Inc.*, 926 F.2d 1030, 1036 (11th Cir. 1991) ("existence of an agency relationship is an issue of fact"); *Metco Prods., Inc., Div. of Case Mfg. Co. v. NLRB*, 884 F.2d 156, 159 (4th Cir. 1989) ("generally, existence and scope of an agency relationship are factual matters"); *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356, 1361 (10th Cir. 1987) ("relationship of principal and agent is ordinarily a question of fact"); *Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1343 (8th Cir. 1976) (to determine if agency exists, surrounding facts and circumstances should be considered, and "the ultimate resolution is appropriately left to the jury in most instances").

Indeed, even the Fifth Circuit has indicated in decisions prior to this case that the question of agency is a fact issue that should be submitted to the jury. *See, e.g., Equilease Corp. v. M/V Sampson, 756* F.2d 357, 363 (5th Cir. 1985) ("the existence of any agency relationship is a question of fact"); *Wood v. Holiday Inns, Inc.*,

508 F.2d 167, 173 (Former 5th Cir. 1978) (the existence and scope of a principal-agent relationship is generally for the jury to determine).

In contrast to those cases, however, the Fifth Circuit in this case decided the agency issue as a matter of law, refusing to submit the question of agency to the jury.[11] *See Arguello*, 207 F.3d at 808. In doing so, the Fifth Circuit relied upon its prior decision in *Neff v. American Dairy Queen Corporation*, 58 F.3d 1063, 1065 (5th Cir. 1995) *cert. denied*, 516 U.S. 1045 (1996), in which the court stated that the agency issue was a question of law.[12] In ruling in *Neff* that the agency question was an

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[11] Interestingly, however, the Fifth Circuit made specific "findings" on the agency issue. *See Arguello v. Conoco, Inc.*, 207 F.3d at 808 *("[w]e find* that there is no agency relationship between Conoco, Inc. and the branded stores") (emphasis added). Not only did the court fail to consider all of the evidence, *see* section A., *supra,* but the court also improperly rendered 'findings' even while considering the issue as a matter of law rather than as a factual issue.

[12] Not only did the Fifth Circuit in this case incorrectly conclude that the agency issue was an issue of law rather than fact, but the Fifth Circuit relied on the *Neff* case which is substantially distinguishable from the facts of this case. In contrast to this case, the issue in *Neff* was whether the franchisor "operated" the franchise store in order to be subject to liability under the public accommodations provisions in Title III of the ADA. This is not an ADA public accommodations case, and the same standards do not apply. Not only are the cases distinguishable in the types of claim presented, but the cases are also distinguishable in light of the evidence presented as well. In *Neff*, plaintiff's only evidence of an agency relationship was the franchise agreement itself. 58 F.3d at 1065. Here, however, Petitioners' submitted not only the PMAs but also external evidence of Conoco's right to control its branded stores as reflected in the Nokes memo and in the PMPA, which, as previously discussed, was completely ignored by the Fifth Circuit.

issue of law, the Fifth Circuit expressly declined to follow the Third Circuit's decision in *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781 (3rd Cir. 1978).

As indicated above, the overwhelming majority of courts treat the agency question as a question of fact rather than law, including but not limited to prior decisions by the Fifth Circuit. In this case, however, the Fifth Circuit followed another prior Fifth Circuit decision that stated that the agency issue is a question of law rather than fact, thereby creating a split between the circuits on this issue. Certiorari should be granted to address the current split among the circuits so that courts will have adequate guidance in resolving these issues in the future.[13]

CONCLUSION

For all the reasons stated herein, this Petition for Writ of Certiorari should be granted.

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[13] Even if this Court rules that the agency question is an issue of law rather than fact, this Court should still grant certiorari because the Fifth Circuit misapplied the summary judgment standard and affirmed summary judgment against Petitioners, when Petitioners presented sufficient evidence to show a genuine issue of material fact on the agency question. *See* Section A.2., *supra*.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-11280

DENISE ARGUELLO, ALBERTO GOVEA,
GARY IVORY, ANTHONY PICKETT,
MICHAEL ROSS, for themselves and all others
similarly situated;
MANUEL ESCOBEDO, MARTHA I. ESCOBEDO,
Plaintiffs-Appellants,

versus

CONOCO, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

April 10, 2000

Before POLITZ, DAVIS, and STEWART,
Circuit Judges.

CARL E. STEWART, Circuit Judge:

The appellants, a group of Hispanic and African-American consumers, filed suit against appellees, Conoco, Inc. ("Conoco" or "Conoco, Inc.") alleging that they were subjected to racial discrimination while purchasing gasoline and other services. Appellants challenge the district court's 12(b)(6) dismissal of their disparate impact claim under 42 U.S.C. § 2000a, and the district court's grant of summary judgment to Conoco on the appellants remaining 42 U.S.C. §§ 1981 and 2000a claims. For the following reasons we affirm in part, and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

There are three different incidents which form the background for this appeal. In March 1995, Denise Arguello ("Arguello"), and her father Alberto Govea ("Govea"), along with various other members of their family stopped at a Conoco-owned store[1] in Fort Worth, Texas. After pumping their gasoline Arguello and Govea entered the store to pay for the gasoline and purchase other items. When Arguello approached the counter she presented the store cashier, Cindy Smith ("Smith"), with her items and a credit card. Smith asked to see Arguello's identification. When Arguello gave Smith her Oklahoma driver's license Smith stated that an out-of-state driver's license was not acceptable identification. Arguello disagreed with Smith and Smith began to insult Arguello using profanity and racial epithets.[2] Smith also knocked a six-pack of beer off the counter toward Arguello. After Arguello retreated from the inside of the store, Smith used the store's intercom system to continue yelling racial epithets. Smith also made obscene gestures through the window.

Moments after the incident occurred Arguello and Govea used a pay phone outside the station to call a Conoco customer service phone number and complain about Smith's conduct. Govea also attempted to reenter the store to discover Smith's name. When Govea attempted to reenter the store, Smith and another store

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[1] We will use the term "Conoco-owned" to denote stores that are owned and operated by Conoco, Inc. "Conoco-branded" stores are stores which are independently owned marketers of Conoco products and are subject to the Petroleum Marketer Agreements.

[2] These racial epithets included "f***ing Iranian bitch", and "go back to where you came from you poor, f***ing Mexicans."

employee locked the doors. Linda Corbin ("Corbin"), a district manager, received Arguello and Govea's complaints. Corbin reviewed video tape from the store, which had no audio, and concluded that Smith had acted inappropriately. When she was confronted by Corbin, Smith admitted to using the profanity, racial epithets, and obscene gestures. Corbin counseled Smith about her behavior but did not suspend, or terminate Smith. Several months after the incident Corbin transferred Smith to another store for Smith's protection after receiving phone calls that a group was planning to picket the store at which the incident took place.

In September 1995, Gary Ivory ("Ivory"), Anthony Pickett ("Pickett"), and Michael Ross ("Ross") visited a Conoco-branded store in Fort Worth, Texas. While inside the store they allege that they were followed by a store employee and after complaining about this treatment a store employee told them "we don't have to serve you people" and "you people are always acting like this." The employee refused to serve them and asked them to leave. Eventually the police were summoned and the policeman ordered the store employee to serve the group.

In November 1996, Manuel Escobedo ("Escobedo") and Martha Escobedo ("Mrs. Escobedo") stopped at a Conoco-branded store in San Marcos, Texas. Escobedo claims that while visiting this store the store employee refused to provide toilet paper for the restroom, shouted profanities at his wife, and said "you Mexicans need to go back to Mexico." Escobedo called Conoco to complain about this incident, and was told by a Conoco customer service supervisor, Pamela Harper, that there was nothing Conoco could do because that station was not owned by Conoco. In a separate incident at a Conoco-branded

store in Grand Prairie, Texas Escobedo was allegedly told by the store clerk that "you people steal gas." Finally, Escobedo claims that at two Conoco-branded stores in Laredo, Texas he was required to pre-pay for his gasoline while Caucasian customers were allowed to pump their gas first and then pay.

In March 1997, Arguello, Govea, the Escobedos, Ivory, Pickett, and Ross ("plaintiffs" or "appellants") filed suit against Conoco, Inc. on behalf of themselves and all other similarly situated parties.[3] The plaintiffs alleged that Conoco was in violation of 42 U.S.C. §§ 1981[4] and 2000a ("Title II")[5] and state law for refusing to serve Hispanic and African-American customers, and subjecting this class of customers to substandard service and racially derogatory remarks. The plaintiffs also claimed that Conoco had illegal policies and practices which disparately impacted Hispanics and African-Americans.

In July 1997, the district court issued an order dismissing all claims based on the plaintiffs' allegations of disparate impact and the plaintiffs' state law claims. In

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[3] In the Plaintiffs' Fourth Amended Complaint they dropped all claims made on behalf of the class.

[4] 42 U.S.C. § 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to full and equal benefit of all laws...as is enjoyed by white citizens."

[5] Title II states that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation...without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a.

October 1998, the district court granted summary judgment to Conoco on all of the plaintiffs' remaining claims.

DISCUSSION

Appellants raise several issues on appeal. First, appellants contend that the district court erred in finding no agency relationship between Conoco, Inc. and the Conoco-branded stores. Appellants also argue that the district court erred in finding no agency relationship between Conoco, Inc. and Cindy Smith because Smith acted outside the scope of her employment. Appellants argue in the alternative that even if Smith was outside the scope of her employment Conoco had a non-delegable duty to prevent racial discrimination, and further that Conoco should be held liable because it ratified Smith's conduct. Finally, appellants contend that the district court improperly dismissed their disparate impact claims under Title II. We will consider each of these issues in turn.

A. Standard of Review

This court reviews a grant of summary judgment de novo. *Neff v. American Dairy Queen Corporation*, 58 F.3d 1063, 1065 (5th Cir. 1995). Summary judgment should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). We review the facts drawing all inferences most favorable to the party opposing the motion. *Neff*, 58 F.3d at 1065 (quoting *Reid v. State Farm Mut. Auto Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986)).

B. Agency Relationship between Conoco, Inc. and Conoco-branded Stores

The incidents involving Ivory, Ross, Pickett and the Escobedos occurred at Conoco-branded stores. These Conoco-branded stores are independently owned, and have entered into Petroleum Marketing Agreements ("PMA") that allow them to market and sell Conoco brand gasoline and supplies in their stores. The district court held that no agency relationship existed between Conoco, Inc. and the Conoco branded stores. The district court found that Conoco, Inc. did not control the details of the daily operations of the Conoco branded stores, including personnel decisions.

The Supreme Court has suggested that in order to impose liability on a defendant under § 1981 for the discriminatory actions of a third party, the plaintiff must demonstrate that there is an agency relationship between the defendant and the third party. *General Building Contractors Association v. Pennsylvania United Engineers and Constructors*, 458 U.S. 375,393, 102 S.Ct. 3141, 3151-52, 73 L.Ed.2d 835 (1982). Agency is a fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. *Id.* at 391 (citing Restatement (Second) of Agency § 1 (1958) ("Restatement")). At the core of agency is a "fiduciary relation" arising from the "consent by one person to another that the other shall act on his behalf and subject to his control...equally central to the master-servant relation is the master's control over or right to control the physical activities of the servant." *Id.* at 393 (citing Restatement §1). Therefore, to establish an agency relationship between Conoco, Inc. and the branded stores the plaintiffs must show

that Conoco, Inc. has given consent for the branded stores to act on its behalf and that the branded stores are subject to the control of Conoco, Inc.

Appellants argue that the PMAs establish that Conoco, Inc. has an agency relationship with the branded stores. They argue that the PMAs give Conoco, Inc. control of the branded stores because the PMAs require the branded stores to maintain their businesses according to the standards set forth in the PMAs. Plaintiffs further contend that Conoco, Inc. controls the customer service dimension of the Conoco-branded stores. As evidence the plaintiffs point to a statement in the PMA that instructs the branded stores that "all customers shall be treated fairly, honestly, and courteously." Furthermore, the plaintiffs assert that Conoco, Inc. has the power to debrand the Conoco-branded stations for not complying with the contractual terms of the PMA. Thus, because of this debranding power the plaintiffs reason that Conoco controls the operations of their brand marketers in all areas which are discussed in the PMA, including customer service. The plaintiffs also produced summary judgment evidence that Conoco, Inc. conducts random, bi-yearly inspections of the branded stores to determine if business is being conducted in accordance with the standards of the PMA.[6]

Despite the plaintiffs' interpretation of the PMAs and the evidence of inspections, the plain language of the PMA defines the relationship between Conoco, Inc. and its branded stores. The PMA states:

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[6] These inspections normally focus on product displays and labeling. Customer service is not considered a main focus of the random inspections.

> Marketer [Conoco branded store] is an independent business and is not, nor are its employees, employees of Conoco. Conoco and Marketer are completely separate entities. They are not partners, general partners...nor agents of each other in any sense whatsoever and neither has the power to obligate or bind the other.

The facts of the present case are similar to the facts which formed the basis of the claim in *Neff v. American Dairy Queen Corporation*, 58 F.3d 1063 (5th Cir. 1995). In *Neff*, the plaintiff appealed summary judgment of her claims against American Dairy Queen Corporation ("ADQ") for violation of the Americans with Disability Act ("ADA"). Neff claimed that ADQ violated the ADA by failing to make its San Antonio stores wheel chair accessible. *Id.* at 1064. We held that ADQ was a franchisor and the franchise agreement specifically stated that ADQ did not own or operate the San Antonio stores. *Id.* at 1068. The only summary judgment evidence presented by Neff was the franchise agreement. Neff argued that contrary to franchise agreement's statement disclaiming operation of the franchisee establishments, other clauses in the franchise agreement demonstrated that ADQ did in fact "operate" the San Antonio stores. *Id.* at 1065. Neff did not allege that the franchise agreement was ambiguous, instead she disputed whether the control over franchisee facilities which was provided for in the agreement made ADQ an "operator." Id. at 1065. The franchise agreement stated that the franchise building should be constructed and equipped in accordance with the ADQ's specifications, and that the building should be maintained in accordance with the ADQ's requirements. *Id.* at 1066. We held that this language in the franchise agreement "[did] not estab-

lish sufficient control on ADQ's part such that ADQ can be said to "operate" the San Antonio stores." *Id.* at 1067.

In the present case, our review of the record and pleadings do not reveal any allegation by the plaintiffs that the language in the PMA is ambiguous as to its meaning. The clauses of the PMA which state that the franchisee's business operations should be conducted in a consistent manner with the standards of Conoco, Inc., and that customers should be treated fairly and courteously are similar to the language of the franchise agreement in *Neff* which required that building specifications be approved by the franchisor. *See also*, *Perry v. Burger King Corporation*, 924 F.Supp. 548 (S.D.N.Y. 1996) (granting summary judgment to defendant based on franchise agreement which defined franchisee as an independent contractor, and plaintiff presented no evidence that franchisor had policies regarding franchisee employees). The language of the PMA, while offering guidelines to the Conoco-branded stores, does not establish that Conoco, Inc. has any participation in the daily operations of the branded stores nor that Conoco, Inc. participates in making personnel decisions.

Therefore, we find that there is no agency relationship between Conoco, Inc. and the branded stores in question, and that Conoco, Inc. as a matter of law cannot be held liable for the unfortunate incidents which happened to Ivory, Pickett, Ross, and the Escobedos at the Conoco- branded stores.

C. Scope of Employment

Arguello and Govea complain of discriminatory treatment at a Conoco-owned store. Appellants argue that the district court erred in finding that Conoco could not

be held liable under Title II, 42 U.S.C. § 2002e-2[7], or 42 U.S.C. § 1981[8], for the acts of its store clerk, Smith. The district court found that as a matter of law there was no agency relationship between Smith and Conoco because Smith's acts of discrimination towards Arguello and Govea were outside the scope of Smith's employment.

In *Flanagan*, this Court considered whether agency principles applied to an employment discrimination suit alleging racial discrimination and seeking relief under both 42 U.S.C. § 1981 and Title VII. *Flanagan v. A.E. Henry Comm. Health Svcs. Ctr.*, 876 F.2d 1231, 1233 (5th Cir. 1989). We held that the doctrine of respondeat superior applied under § 1981[9] to render the employer liable for the discriminatory acts of the plaintiff's supervisors. *Id.* at 1236 (relying on the Supreme Court's implication, in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 392, 102 S.Ct. 3141, 3151-52, 73 L.Ed.2d 835 (1982), that agency

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[7] 42 U.S.C. § 2000a provides, in relevant part "[a]ll persons shall be entitled to full and equal enjoyment of the goods, services, facilities, privileges, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

[8] 42 U.S.C. § 1981 provides, in relevant part, "[a]ll persons within the jurisdiction of the United States shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens."

[9] As the district court noted in its opinion, a plaintiff must prove purposeful discrimination under § 1981. *See Patterson v. McClean Credit Union*, 491 U.S. 164, 186, 109 S.Ct 2363, 2377, 105 L.Ed.2d 132 (1989) (citing *General Bldg. Contractors*, 458 U.S. at 391, 102 S.Ct. at 3150). A successful § 1981 plaintiff may be entitled to compensatory and punitive damages. Under Title II the only relief is injunctive. Therefore, we see no reason that vicarious liability standards under § 1981 should not also be applicable to Title II.

principles apply under § 1981). In *Flanagan*, we did not foreclose the possibility that an employer must respond in damages for the acts of a non-supervisor. *Id.* Conoco does not dispute that we must apply agency principles in determining liability under § 1981. However, Conoco cites a recent Supreme Court decision holding that courts may not hold an employer vicariously liable for the discriminatory actions of non-supervisory employees. *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

In *Faragher*, the plaintiff brought a sexual harassment action under Title VII claiming sexual discrimination in the "terms, conditions, and privileges" of her employment. *Faragher*, 524 U.S. at 781, 118 S.Ct. at 2280. The Court held that an employer is subject to vicarious liability for the discriminatory actions of supervisory employees where the employer undertakes tangible employment action, discharge, demotion, or undesirable reassignment. *Id.* at 807, 118 S.Ct. at 2293. The Court further held that when no tangible employment action is taken such as in a hostile environment sexual harassment action, "a defending employer may raise an affirmative defense[10] to liability or damages ...." *Id.* at 807-08, 118 S.Ct at 2293. The Supreme Court explained that:

> [w]hen a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw

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[10] "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

> upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker. When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose 'power to supervise-[which may be]-to hire and fire, and to set work schedules and pay rates-does not disappear ... when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion.

Id. at 803, 118 S.Ct. at 2291.

Conoco argues that we should follow *Faragher* and hold that Conoco is not vicariously liable for the actions of Smith, a non-supervisory employee. Alternatively, Conoco argues that even if it has some responsibility for Smith's acts it is entitled to assert an affirmative defense as outlined by the Court in *Faragher*, by showing at trial that it was not negligent. It points to the lack of evidence indicating prior harassment by Smith that would have notified Conoco of her behavior so that Conoco could have had an opportunity to fashion a remedy. We disagree with Conoco's arguments.

The Supreme Court in *Faragher* recognized that in an action based on discrimination in the workplace whether the discriminating party is a supervisor is all-important. The supervisor controls the career of the employee under his supervision. The offended employee cannot rebuke the supervisor, laugh at the supervisor, or walk away from the supervisor as she could from a fellow employee. In a public accommodation case such as this,

the supervisory status of the discriminating employee is much less relevant than it is in an employment discrimination case. Smith subjected Arguello and Govea to discrimination that was just as harmful as if the discriminatory acts had been committed by one of Conoco's supervisory employees. We are therefore not persuaded that the Supreme Court would apply the same restricted vicarious liability rule in this public accommodation context as it did in *Faragher*, involving discrimination in the workplace.

Also, in a public accommodation case under § 1981, a rule that only actions by supervisors are imputed to the employer would result, in most cases, in a no liability rule. Unlike the employment context it is rare that in a public accommodation setting a consumer will be mistreated by a manager or supervisor. Most consumer encounters are between consumers and clerks who are non-supervisory employees.

In *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1089 (7th Cir. 1992), *cert. denied*, 508 U.S. 972, 113 S.Ct 2961, 125 L.Ed.2d 662 (1993), plaintiff sued a real estate company under the Fair Housing Act and § 1982, a companion statute to § 1981. One of the questions presented in the case was whether the real estate company was responsible for the discriminatory acts of its employees, who engaged in illegal racial steering. *Id.* at 1096-97. The court, applying the Restatement (Second) of Agency, held that the real estate company was responsible for the acts of these non-supervisory employees. *Id.* at 1098. For all of these reasons, we are persuaded that the restrictive rules of respondeat superior, applied in *Faragher*, do not apply to this case.

Under general agency principles a master is subject to liability for the torts of his servants while acting in the scope of their employment. *See* Restatement § 219. Some of the factors used when considering whether an employee's acts are within the scope of employment are: 1) the time, place and purpose of the act; 2) its similarity to acts which the servant is authorized to perform; 3) whether the act is commonly performed by servants; 4) the extent of departure from normal methods; and 5) whether the master would reasonably expect such act would be performed. *Domar Ocean Transportation Ltd. v. Independent Refining Company*, 783 F.2d 1185, 1190 (5th Cir. 1986) (citing Prosser and Keeton, The Law of Torts 502 (5th ed. 1984); Restatement § 228.

First, we must consider the time, place and purpose of Smith's actions. Smith's behavior toward Arguello and Govea occurred while she was on duty inside of the Conoco station where she was employed. The plaintiffs also put forth summary judgment evidence that Smith asked Arguello to present identification for credit card purchases. The purpose of Smith's interaction with Arguello was to complete the sale of gas and other store items. The initial confrontation and subsequent use of racial epithets occurred while Smith was completing Arguello's purchase of her items and processing the credit card transaction.

Second, we must consider whether Smith's actions were similar to those she was authorized by Conoco to perform. The sale of gasoline, other store items, and the completion of credit card purchases are the customary functions of a gasoline store clerk. The plaintiffs presented summary judgment evidence that Smith also used the intercom, which is also a customary action of gasoline store clerks.

Third, we will examine the extent of Smith's departure from normal methods. It is self-evident that Smith did not utilize the normal methods for conducting a sale. There was no summary judgment evidence presented that Conoco expected or anticipated that Smith would perform her functions in this manner. The appellees would have this court adopt the position that because Smith's use of racial epithets is comparable to the commission of an intentional tort, Conoco should not be held liable for Smith's behavior. However, the fact that an employee engages in intentional tortious conduct does not require a finding that the employee was outside the scope of his employment. *Domar*, 783 F.2d at 1190 (citing Restatement § 231). In *Domar*, we found that a captain of a tanker vessel who stole crude oil and sold the oil was within the scope of his employment when he committed the theft and sale. *Id.* This court found that the captain's illegal actions took place while he was serving as master of the vessel and that the illegal transaction was similar to other transactions he had authority to perform. *Id.* We correctly concluded that although the captain's employer did not expect the captain to steal the cargo, that factor was outweighed by the other considerations. *Id.* In the present case, although Conoco could not have expected Smith to shout racial epithets at Arguello and Govea, Smith's actions took place while she was performing her normal duties as a clerk. Conoco, Inc. had authorized Smith to interact with customers as they made purchases. Therefore, although Smith did depart from the normal methods of conducting a purchase this does not lead to the conclusion that as a matter of law she was outside the scope of her employment.

Finally, we must consider whether Conoco could have reasonably expected Smith to act in a racially discrimi-

natory manner. There is no evidence in the record on this prong of the test. However, we note that even if Conoco is able to show that they could not have expected this conduct by Smith, the jury is entitled to find that the other factors outweigh this consideration. *Domar*, 783 F.2d at 1190.

In assessing whether Smith was within the scope of her employment the district court found that the only summary judgment evidence presented by the plaintiffs was that Smith was working in her job as cashier when the offensive behavior occurred. The district court concluded that the summary judgment evidence was insufficient to "overcome the common-sense conclusion" that Smith's offensive actions were not within the scope of her employment. However, we reject the presumption that because Smith behaved in an unacceptable manner that she was obviously outside the scope of her employment. *See Domar*, 783 F.2d at 1190. The plaintiffs did present summary judgment evidence that Smith was on duty as a clerk, and that she was performing authorized duties such as conducting sales. This summary judgment evidence is not insignificant. Smith's position as clerk, and her authorization from Conoco to conduct sales allowed her to interact with Arguello and Govea, and put Smith in the position to commit the racially discriminatory acts. The plaintiffs also presented summary judgment evidence that Smith used her authority to conduct credit card transactions and use the gas station intercom system to commit the acts in question.

It is also important to note that Conoco does not challenge whether this incident occurred. Smith admitted to a Conoco district manager that she did subject Arguello and Govea to the use of racial epithets, profanity, and obscene gestures. The only dispute is whether

there is a legal remedy for Arguello and Govea by holding Conoco liable for Smith's actions. The plaintiffs contend that the inference that should be drawn from Smith's actions is that Smith was authorized by Conoco to perform the actions of a clerk and that this meant that her actions while on duty as clerk were within the scope of her employment. Conoco, utilizing the same facts asks us to draw the inference that because Smith was acting on personal racial bigotry and animosity that she was outside the scope of her employment.

This court has repeatedly held that when the basic facts of a case are undisputed and the parties disagree about the material factual inferences that may be drawn from these facts summary judgment may be improper. *See Winters v. Highlands Insurance Company*, 569 F.2d 297, 299 (5th Cir. 1978). Summary judgment is appropriate when a party fails to "make a showing sufficient to establish the existence of an element essential, to the party's case, and on which that party will bear the burden of proof at trial." *Celotex Corporation v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

The plaintiffs in the present case do bear the burden of proof to establish the existence of an agency relationship between Smith and Conoco. *See Karl Rove & Co. v. Thornburg*, 39 F.3d 1273, 1296 (5th Cir. 1994). To establish an agency relationship between Smith and Conoco the plaintiffs must establish that Smith was within the scope of her employment when she committed the racially discriminatory acts against Arguello and Govea. *See* Restatement § 319. The factors for establishing scope of employment were outlined in *Domar*. As we have discussed *supra* it is clear that the plaintiffs have presented summary judgment evidence regarding these

factors. Therefore, the plaintiffs have met the standard set forth in *Celotex*, and summary judgment should not have been granted in favor of Conoco.

D. Non-Delegable Duty

Appellants argue in the alternative that even if Smith was outside the scope of her employment Conoco should still be held liable because it had a non-delegable duty not to discriminate against minority consumers. A master is not subject to liability for the torts of his employees acting outside the scope of their employment, unless: 1) the master intended the conduct or consequences, 2) the master was negligent or reckless, or 3) the conduct violated a non-delegable duty of the master, or 4) the employee purported to speak on behalf of the principal. Restatement § 219(2). The argument that an employer has a non-delegable duty under § 1981 not to discriminate has been largely foreclosed by the Supreme Court in *General Building Contractors*, 458 U.S. at 395. In *General Building Contractors*, the Supreme Court stated that § 1981 is meant to prohibit employers from intentional discrimination and not intended to make them guarantors of rights against all third parties. *See General Building Contractors*, 458 U.S. at 396. Therefore, it follows that the duty not to discriminate is not a non-delegable duty, instead a plaintiff must establish a close connection between the employer and the third party who engages in the intentional discrimination.

Plaintiffs also argue in the alternative that Conoco ratified the actions of Smith by not suspending or firing her. In order for an employer to be found to have ratified the actions of an employee the employer must know of the act and adopt, confirm, or fail to repudiate the acts of its employee. *See generally*, *Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649, 653-54 (5th Cir. 1994). In

the present case, after Conoco was notified of Smith's actions, a customer service supervisor, Linda Corbin, told Arguello and Govea that she agreed that Smith had acted inappropriately and she counseled Smith about her behavior. While Conoco did not fire or suspend Smith, it does not appear that Conoco ratified Smith's actions.

E. Disparate Impact Claims under Section 2000a

Appellants argue that the district court erred in finding that as a matter of law the plaintiffs could not state a claim for redress under 42 U.S.C. § 2000a ("Title II") based on a disparate impact theory. The district court found that the language of Title II evidences an intent to prohibit only intentional discrimination and that disparate impact claims are not cognizable under Title II. However, the district court offered no authority to support that proposition. Neither the Supreme Court nor this court has addressed the question of whether disparate impact claims are cognizable under Title II. Furthermore, the law in the other circuits is generally unclear as to whether disparate impact claims are recognized under Title II.[11]

In the present case, even assuming arguendo that disparate impact claims are cognizable under Title II,

[11] *See* Stephen E. Haydon, A Measure of Our Progress: Testing for Race Discrimination in Public Accommodations, 44 UCLA L. Rev. 1207, 1220 n.47 (1997). There are cases in which courts have acknowledged disparate impact theories in Title II cases. *See e.g.*, *Robinson v. Power Pizza, Inc.*, 993 F.Supp. 1462, 1464-65 (M.D. Florida 1997) (parties agreed and court applied disparate impact analysis in Title II claim); *Olzman v. Lake Hills Swim Club*, 495 F.2d 1333, 1340 (2d Cir. 1974) (using disparate impact analysis in case against social club in which plaintiffs challenged facially neutral club guest policy).

the plaintiffs did not establish a prima facie case of discrimination of the type required in disparate impact claims.[12] The plaintiffs failed to allege that there was a specific Conoco policy which had a negative disparate effect on minority customers. The plaintiff's complaint contains general allegations that Conoco's policies and or practices though neutral on their face have a disparate impact on black and Hispanic persons. In their original complaint and subsequent amended complaints plaintiffs failed to identify any specific Conoco policy that had a discriminatory effect. Furthermore, the plaintiffs also failed to provide a specific allegation that any Conoco practice or policy was having an effect on an identified class of Conoco's consumers. The plaintiffs' complaints set forth facts regarding approximately six specific incidents of racially discriminatory treatment, but do not establish any widespread or general effect on minority consumers. During discovery it was shown that in a two year period Conoco received between ten and twenty complaints which alleged racial discrimination. Therefore, because the plaintiffs' allegations could not support a disparate impact claim, we decline to decide whether disparate impact claims are generally cognizable under Title II. We conclude that the district court properly granted the motion to dismiss under 12(b)(6) for failure to state a claim upon which relief can be granted.

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[12] In disparate impact claims the plaintiff must first establish that there is neutral policy or practice that has had a discriminatory impact on a particular group. *See e.g., Griggs v. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1972); *Simms v. First Gibraltor Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996).

CONCLUSION

We hold that the district court did not err in finding that no agency relationship existed between Conoco, Inc. and its branded stores, and properly entered summary judgment against the Escobedos, Ivory, Pickett, and Ross. We also affirm the district court's dismissal of the plaintiffs' disparate impact claims for failure to state a claim upon which relief could be granted. We reverse the district court's determination that Cindy Smith acted outside the scope of her employment as a matter of law and remand for further proceedings consistent with this opinion.

AFFIRMED in part, and REVERSED in part.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Civil Action No. 3:97-CV-0638-H

DENISE ARGUELLO, et al.,
Plaintiffs

v.

CONOCO, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

[Filed: October 7, 1998]

Before this Court is Defendant Conoco, Inc.'s Motion for Summary Judgment, with a supporting brief and appendix, filed July 27, 1998; Plaintiffs' Response to Defendant's Motion for Summary Judgment, with a supporting brief and appendix, filed August 31, 1998; and Defendant's Reply Brief, filed September 21, 1998.

Plaintiffs sue for injunctive relief and monetary damages based on the allegedly discriminatory treatment they received at Conoco gas stations. Defendant Conoco, Inc. ("Conoco") now moves for summary judgment arguing that it is not legally responsible for the discriminatory acts of its employee or the employees of independently owned and operated Conoco franchises (hereinafter, "Conoco-branded stores"). Plaintiffs oppose this motion.

Having considered the motions and briefs of both parties, and for the reasons set forth below, the Court concludes that there is no genuine issue of material fact and that Defendant Conoco is entitled to judgment as a

matter of law. Defendant Conoco's Motion for Summary Judgment will be granted.

I. BACKGROUND

Plaintiffs Denise Arguello, Manuel Escobedo, Martha Escobedo, Alberto Govea, Gary Ivory, Anthony Pickett, and Michael Ross brought this suit claiming Conoco gas stations were discriminating against Hispanics and African-Americans in their provision of services. The incidents underlying this suit allegedly transpired against three distinct groupings of the plaintiffs at no less than five different Conoco gas stations. Furthermore, the specific Conoco gas stations involved can be divided into two distinct classes, the one store directly owned and operated by Defendant Conoco, Inc., and the four other stores independently owned and operated by franchisees of the Defendant — the Conoco-branded stores.

A. Incident Involving Plaintiffs Arguello and Govea

Plaintiffs Denise Arguello and Alberto Govea claim that in March of 1995, Plaintiff Arguello, her husband, three of her children, Plaintiff Govea (who is Plaintiff Arguello's father), and Plaintiff Govea's wife (who is also Plaintiff Arguello's mother) stopped at a Conoco gas station on Randol Mill in Fort Worth, Texas to purchase gasoline and some beer and soda. This station is owned and operated by Defendant, Conoco. When Denise Arguello, along with her father, Alberto Govea, attempted to pay for her purchases with an American Express card, the cashier at the store, Ms. Cindy Smith, asked Ms. Arguello to provide some sort of identification in order to complete the purchase. When Ms. Arguello

presented her Oklahoma[1] driver's license, Ms. Smith refused to accept it, claiming it was an invalid form of identification and that it was her duty to refuse out-of-state driver's licenses. Ms. Smith eventually accepted Ms. Arguello's credit card, but while Ms. Arguello was signing the receipt for her credit card purchase, Ms. Smith began to yell racial obscenities at her. This haranguing continued even after Ms. Arguello and Mr. Govea left the store. Ms. Smith utilized the store's intercom to continue her racial slurs, while supplementing them with obscene gestures.

Ms. Arguello and Mr. Govea reported this incident to the store manager and the district manager of Conoco. The district manager had viewed a videotape of the incident and agreed with Ms. Arguello that she had been mistreated. Ms. Smith was transferred to another store.

B. Incident Involving Plaintiffs Gary Ivory. Anthony Pickett and Michael Ross

In September 1995, at a Conoco-branded store located on Country Club Lane in Fort Worth, Texas, Gary Ivory, Anthony Pickett and Michael Ross, all of whom are black, were suspected of theft and told by a store clerk that "we don't serve you people" and that "you always act like this."

C. Incidents Involving Plaintiffs Manuel and Martha Escobedo

In November 1996, while at a Conoco-branded store in San Marcos, Texas, a store clerk called Martha Escobedo an obscene name, and told her and Manuel

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[1] Ms. Arguello is a resident of Broken Arrow, Oklahoma.

Escobedo (her husband) that "you Mexicans need to go back to Mexico." Furthermore, the Escobedos assert they have consistently been asked to prepay for gas at Conoco-branded stores in Laredo, Texas, while white customers have not.

D. Procedural History of The Plaintiffs' Suit

On March 24, 1997, Plaintiffs filed their Original Complaint — Class Action, alleging Defendant Conoco, Inc., discriminated in providing services to African-American and Hispanic customers. On March 27, 1997, Plaintiffs filed their First Amended Complaint, averring causes of action under 42 U.S.C. § 1981 (the Civil Rights Act of 1866), 42 U.S.C. § 1985(3) (civil conspiracy), 42 U.S.C. § 2000a (Title II - Public Accommodations), Texas Business and Commerce Code § 17.50 (Texas Deceptive Trade Practices Act ("DTPA")), and common law negligent supervision. On April 28, 1997, Conoco moved for the dismissal of all claims based on allegations of disparate impact, the DTPA, and negligent supervision. This Court granted Defendant's motion in a July 21, 1997, Memorandum Opinion and Order. On September 24, 1997, Conoco filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim or, in the alternative a Rule 12(c) motion for judgment on the pleadings with regards to the Plaintiffs' remaining claims. This Court, in a November 21, 1997, Memorandum Opinion and Order, granted that motion as to Plaintiffs' claims under 42 U.S.C. § 1985(3), but denied it as to their claims under 42 U.S.C. § 1981 and 42 U.S.C. § 2000a. On March 28, 1998, Plaintiffs filed their Fourth Amended Complaint, which deleted from their Complaint the class action and pattern and practice allegations. Conoco filed this motion for summary judgment on July 27, 1998.

II. RELEVANT STANDARD

The Federal Rules of Civil Procedure provide that summary judgment shall be rendered when the evidence establishes that there is "no genuine issue as to any material fact" and that the movant is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c); *see Ruiz v. Whirlpool, Inc.*, 12 F.3d 510, 513 (5th Cir. 1994); *Armstrong v. City of Dallas*, 829 F. Supp. 875, 876 (N.D. Tex. 1992), *aff'd* 997 F.2d 62 (5th Cir. 1993). Under proper circumstances, awarding summary judgment is favored in the federal courts: "Summary judgment reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1197 (5th Cir. 1986) (footnote omitted).

A summary judgment movant must inform the court of the basis for the motion and identify the material specified in Rule 56(c) that it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Topalian* v. *Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, 506 U.S. 825 (1992). If the movant falls to meet its initial burden, the motion must be denied, regardless of the nonmovant's response. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1975 (5th Cir. 1994) (en banc).

If the movant carries its burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *Celotex*, 477 U.S. at 324. A party opposing summary judgment must go beyond the pleadings and "set forth specific facts" showing that there is a "genuine issue for trial." Fed. R. Civ. P. 56(e); *see*

Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Ruiz*, 12 F.3d at 513; *Armstrong*, 829 F. Supp. at 876. A party opposing summary judgment may not rest on mere conclusory allegations or denials in the pleadings. Fed. R. Civ. P. 56(e); *see also Hightower v. Texas Hosp. Ass'n.*, 65 F.3d 443, 447 (5th Cir. 1995). Furthermore, a party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. There must be "significant probative evidence" on which a jury could reasonably find for the nonmovant. *Anderson*, 477 U.S. at 249.

In determining whether a genuine issue exists for trial, the Court must view the evidence introduced and all factual inferences from the evidence in the light most favorable to the nonmovant. *Eastman Kodak v. Image Technical Servs., Inc.*, 504 U.S. 451, 456-58 (1992); *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 292 (5th Cir. 1990); *see also Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5th Cir. 1993). If the record, taken as a whole, cannot "lead a rational trier of fact to find for the nonmoving party," no genuine issue remains for trial. *Matsushita*, 475 U.S. at 587; *see Friou v. Phillips Petroleum Co.*, 948 F.2d 972, 974 (5th Cir. 1991).

III. ANALYSIS

As the case now stands, plaintiffs seek relief under two different statutes based on events which occurred at Conoco gas stations under two distinct ownership structures. Plaintiffs seek relief under both 42 U.S.C. § 1981 (the Civil Rights Act of 1866) and 42 U.S.C. § 2000a (Title II — Public Accommodations). The incident underlying the claims of plaintiffs Denise Arguello and

Alberto Govea occurred at a gas station owned and operated by Conoco. The claims of the other plaintiffs arise from events which transpired at Conoco-branded stores. The analysis as to the potential liability of Conoco is different for each of the two ownership structures.

A. 42 U.S.C. § 1981

Section 1981 provides that all persons in the United States shall have the same contractual rights as white citizens. 42 U.S.C. § 1981(a). "Claims of racial discrimination brought under § 1981 are governed by the same evidentiary framework applicable to claims of employment discrimination brought under Title VII." *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, __ F.3d __, No 97-10685, 1998 WL 645810, at *4 (5th Cir. Sept. 24, 1998) *quoting LaPierre v. Benson Nissan, Inc.*, 86 F.3d 444, 448 n.2 (5th Cir. 1996). Thus, to prevail under § 1981, the plaintiff must establish a *prima facie* case of intentional discrimination. If the plaintiff successfully establishes a *prima facie* case, the burden then shifts to the defendant to articulate a legitimate non-discriminatory reason for the challenged action. If the defendant meets this burden, the plaintiff must then demonstrate that the defendant's proffered explanation is not the actual reason for its decision, but is instead a pretext for discrimination. *See Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 992-93 (5th Cir. 1996) (en banc).

B. Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a

Title II of the Civil Rights Act of 1964 ("Title II") entitles all persons to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, without discrimination on the basis of race, color,

religion, or national origin. 42 U.S.C. § 2000a(a). The statute further prohibits any person from withholding, denying, or attempting to withhold or deny any person any right secured by Title II, 42 U.S.C. § 2000a-2. The statute also creates a private right of action for injunctive relief, but not for monetary damages. 42 U.S.C. § 2000a-3(a).

The parties do not indicate, and the Court's independent research has not revealed, Fifth Circuit cases discussing the burdens on the respective parties in relation to a claim under Title II. Those courts which have considered the issue have applied the well-established burden-shifting rules governing Title VII. *See Hornick v. Noyes,* 708 F.2d 321, 325 n.8 (7th Cir. 1983) (upholding the district court's application of the burden-shifting framework of Title VII established in *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981)); *Robinson v. Power Pizza, Inc.,* 993 F. Supp. 1462, 1464 (M.D. Fla. 1998) (utilizing the Title VII burden-shifting test in Title II case.); *Boyle v. Jerome Country Club,* 883 F. Supp. 1422, 1429 (D. Idaho 1995) (applying *Burdine* burden-shifting rules to Title II). Since no Fifth Circuit case discusses the proper framework to use, and the Fifth Circuit has not hesitated to apply the Title VII burden-shifting framework outside of Title VII, *see Rhodes,* 75 F.3d at 992 n.3 (applying Title VII burden-shifting rules to age discrimination claims); *Harrington,* 118 F.3d at 367 (applying Title VII burden-shifting rules to claims arising under 42 U.S.C. § 1981), this Court will apply the burden-shifting rules established in *Burdine* and its progeny to this case.

C. Plaintiffs Gary Ivory. Anthony Pickett. Michael Ross. Martha Escobedo, Manuel Escobedo

The causes of action of plaintiffs Ivory, Pickett, Ross, and the Escobedos (Martha and Manuel) under 42 U.S.C. § 1981 and Title II stem from at least three separate incidents at four different Conoco-branded stores. The issue presented is to what extent can a third-party hold a franchisor liable for the torts of the employees of a franchisee.

This inquiry begins with the basic question of whether an agency relationship exists between Conoco, Inc., and Conoco-branded stores such that the acts of a Conoco-branded store can be considered the acts of the Defendant, and therefore, the Defendant can be held legally accountable. The essential element of an agency relationship is the right of control. The alleged principal must "have the right to control both the means and the details of the process by which the alleged agent is to accomplish his task." *Matter of Carolin Paxon Advertising; Inc.*, 938 F.2d 595, 598 (5th Cir. 1991). Moreover, this right of control must pertain to a task or matter material to the lawsuit. *O'Bryant v. Century 21 South Central States, Inc.*, 899 S.W.2d 270, 271 (Tex. App. 1995, no writ).

Plaintiffs Ivory, Pickett, Ross, and the Escobedos attempt to establish this element of control by pointing to the Petroleum Marketer Agreements (PMAs) between Defendant Conoco, Inc., and the Conoco-branded stores. *(See* Def's App. in Supp. of Mot. for Summ. J. at APP 0001 - 0302.) Each of the PMAs between Conoco and the Conoco-branded stores at question provides that the Conoco-branded store shall conduct its inde-

pendent business operations consistent with the standards and requirements set forth in the agreement, one of which is to treat all customers "fairly, honestly, and courteously." (Def's App. in Supp. of Mot. for Summ. J. ¶ 3(I)(9) at APP 0003; ¶ 4(H)(1)(e) at APP 0032.) However, as Conoco points out, the same PMAs define the relationship between Conoco and the Conoco-branded stores as follows:

> The [Conoco-branded store] is an independent business and is not, nor are its employees, an employee of Conoco. Conoco and the [Conoco-branded store] are completely separate entities. They are not partners, general partners, limited partners, joint venturers, nor agents of each other in any sense whatsoever and neither has the power to obligate or bind the other.

(Def's App. in Supp. of Mot. for Summ. J. ¶10 at APP 0014; ¶14 at APP 0110.)

To overcome this express clause of no agency relationship in the PMAs, the plaintiffs must produce proof to show that the true operating agreement was one which vested the right of control in the franchisor." *O'Bryant* 899 S.W.2d at 272. The plaintiffs have not offered any such summary judgment evidence. All that the PMAs establish is that Conoco has contracted for protections of its trademark. The PMAs do not in and of themselves create an agency relationship. Moreover, Plaintiffs have not offered any summary judgment evidence demonstrating that Conoco controlled the details of the daily operations of the Conoco-branded stores. On the other hand, Conoco presents summary judgment evidence that issues such as the hiring and firing of employees are left to the absolute discretion of each Conoco-branded

store. (*See* Decl. of Alan K. Kosley, Marketing Manager, Wholesale, Branded Marketing Gulf Coast at ¶11, Def's App. in Supp. of Mot. for Summ. J. at APP 0305.) This evidence further confirms the conclusion that Conoco did not control the "means and details" of the operation of the Conoco-branded stores. Therefore, as a matter of law, Conoco-branded stores are not the agents of Conoco, Inc. *See also Perry v. Burger King Corp.*, 924 F. Supp. 548, 554 n.4 (S.D.N.Y. 1996) (listing analogous cases finding franchisee is not the agent of the franchisor).

Since the Conoco-branded stores are not agents of Defendant Conoco; it follows that the employees of a Conoco-branded store are also not the agents of Defendant Conoco. That being so, Defendant Conoco cannot be held liable for any of the discriminatory acts of the employees of the Conoco-branded stores.

Plaintiffs Ivory, Pickett, Ross, and the Escobedos also attempt to establish Defendant Conoco's liability by claiming that the Defendant cannot absolve itself from liability by delegating the duty not to discriminate to an agent. This argument fails for two reasons. First, the Conoco-branded stores are not agents of Conoco, so there has been no delegation of a non-delegable duty to an agent. Second, in making this argument plaintiffs rely on housing discrimination cases grounded in the underlying policies and language of the Fair Housing Act, 42 U.S.C. § 3601, *et. seq,* which do not apply to the situation in this case.

Plaintiffs Ivory, Pickett, Ross, and the Escobedos have not offered any evidence or theory under which Defendant Conoco can be held liable; there being no genuine issue of material fact, Defendant Conoco's Motion for Summary Judgment is granted and all claims

of plaintiffs Ivory, Pickett, Ross, and the Escobedos against Defendant Conoco must be dismissed.

D. The Claims of Plaintiffs Denise Arguello and Alberto Govea

Plaintiffs Denise Arguello and Alberto Govea suit against Conoco for violations of both 42 U.S.C. § 1981 and Title II is based on an incident with the cashier at a Conoco gas station on Randol Mill in Fort Worth, Texas. This particular station is owned and operated by Defendant Conoco, Inc. The question, therefore, becomes to what extent may Conoco be held liable for the discriminatory acts of its employee towards a third party.

The Supreme Court considered the issue of vicarious liability under 42 U.S.C. § 1981 in *General Building Contractors Association v. Pennsylvania,* 458 U.S. 375 (1982), but did not determine whether the mere existence of an agency relationship without more is sufficient to impose liability under § 1981. In applying *General Building Contractors,* the Fifth Circuit has allowed for a principal to be held liable under § 1981 for the acts of an agent, with the qualification that the finding of intentional discrimination necessary to a § 1981 claim "demands a closer look at the relationship between principal and agent." *Flanagan v. A.E. Henry Community Health Servs. Ctr.,* 876 F.2d 1231, 1236 (5th Cir. 1989). In *Flanagan,* the Circuit Court found a sufficiently close agency relationship between the Medical and Executive Directors of a community health center and the health center itself to find the health center liable based on the acts of the Directors. Therefore, to determine Conoco's liability for the discriminatory acts of its employee the Court will look to the existence of an

agency relationship and the basic principles of agency law.[2]

Under the common law of agency,[3] an employer is not responsible for every tort or wrongful act committed by an employee. In general, an employer is liable only for those torts of an employee committed within the "scope

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[2] Conoco, relying on a favorable reference to a Seventh Circuit case, *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986), in *Flanagan*, 876 F.2d at 1236, pushes the argument that it is not the existence of an agency relationship with the employee which determines their liability but whether the employee was a managerial or non-managerial employee. The Court has been unable to locate Fifth Circuit precedent in support of Conoco's argument.

[3] In a recent decision examining the limits of an employer's vicarious liability for the discriminatory acts of an employee under Title VII of the Civil Rights Act of 1964, *Burlington Indus., Inc. v. Ellerth,* 118 S.Ct. 2257 (1998), the Supreme Court turned to the principles of agency law. In so doing the Court relied on "the general common law of agency, rather than the law of a particular state" in an effort to establish "a uniform and predictable standard" as a matter of federal law. *Id.* at 2265. Before this decision, the Fifth Circuit had also utilized common law agency principles to determine an employer's vicarious liability under Title VII. *Long*, 88 F.3d at 306. While this Court recognizes that in *Burlington* the Supreme Court was interpreting the specific meaning of a specific word in a specific statute ("employer" as used in Title VII), the general principles of uniformity and predictability of liability under a federal statute apply with equal force to § 1981. The Court also notes that, since Texas has adopted the Restatement (Second) of Agency's general test for respondeat superior liability, the analysis would be substantially the same under the law of Texas. *See Moore's; Inc. v. Garcia,* 604 S.W.2d 261 (Tex. App. 1980, no writ) (finding the Restatement (Second) of Agency is the controlling statement of law); *see also Rodriguez v. Sarabyn,* 129 F.3d 760, 768 (5th Cir. 1997) (looking to Restatement (Second) of Agency in determining employer liability under Texas law).

of employment." An employee's "scope of employment" has traditionally been defined as conduct "of the kind [the employee] is employed to perform," occurring "substantially within the authorized time and space limits," and actuated, at least in part, by "a purpose to serve the master." *Id,* § 228. However, an employer may be liable for the actions of an employee which are outside the scope of employment if (1) the employer intended the conduct or consequences of the actions; (2) the employer was negligent or reckless; (3) the conduct violated a nondelegable duty of the employer; or (4) the employee purported to act or to speak on behalf of the employer and there was reliance upon apparent authority; or the employee was aided in accomplishing the tort by the existence of the agency relation. Restatement (Second) of Agency, § 219 (1957).

Traditionally, the intentional torts of an employee have been determined to be outside of the scope of the employee's employment. Such acts are viewed as being committed for reasons of personal ill will and not for the purpose of serving the employer. *See Id,* § 235 crnt. a. illus. 2. While employers are not absolutely absolved of responsibility for their employees' intentional torts it is "accepted that 'it is less likely that a willful tort will properly be held to be in the course of employment and that the liability of the master for such torts will naturally be more limited.'" *Burlington,* 118 S.Ct. at 2266, *quoting* F. Mechem, *Outlines of the Law of Agency* § 394, p. 266 (P. Mechem 4th ed., 1952).

In this case, Plaintiffs Arguello and Govea contend that Conoco's employee, Ms. Cindy Smith, was acting within her scope of employment when she began berating them with racial slurs. Since the plaintiffs are alleging the existence of the agency relationship, they

have the burden of establishing its existence. *Karl Rove & Co. v. Thornburg,* 39 F.3d 1273, 1296 (5th Cir. 1994). The only summary judgment evidence Plaintiffs have offered in support of their claim of agency is that Ms. Smith was working in her job as a cashier when she engaged in her offensive behavior and that she claimed that it was her duty to refuse Ms. Arguello's out-of-state driver's license. Even taken in the light most favorable to the Plaintiffs, this quantum of summary judgment evidence is simply insufficient to overcome the common-sense conclusion that her offensive actions were not within the scope of her employment. Plaintiffs have not furnished any summary judgment evidence establishing Conoco's corporate polices as to the acceptance of credit cards from customers or requests for identification. Additionally, Plaintiffs do not provide any summary judgment evidence that Ms. Smith was under the impression that her behavior would somehow benefit her employer. Consequently, this Court finds that Ms. Smith was acting outside the scope of her employment and, therefore, Defendant Conoco is not liable for her personal discriminatory acts.

Furthermore, Conoco cannot be held liable for Ms. Smith's actions under any of the other agency principles delineated in Section 219 of the Restatement (Second) of Agency. Plaintiffs have not offered any summary judgment evidence to demonstrate Conoco intended for her to behave in this way. There is no summary judgment evidence to find Conoco reckless or negligent. Plaintiffs' allegations do not concern a non-delegable duty. No summary judgment evidence has been offered to establish that Ms. Smith was somehow aided in accomplishing the tort by the existence of her relationship with Conoco. Finally, Plaintiffs have not alleged that Conoco

has in any way ratified Ms. Smith's behavior; indeed, the facts are to the contrary. *See* p .3, *supra*.

Since Conoco is not liable for the actions of Ms. Smith as a matter of law, and there are no genuine issues of material fact, Defendant Conoco's Motion for Summary Judgment is granted with respect to Plaintiffs Arguello and Govea's claims against Defendant Conoco.

IV. CONCLUSION

Defendant Conoco is entitled to judgment as a matter of law. Defendant Conoco's Motion for Summary Judgment is **GRANTED** as to all claims of all plaintiffs. Judgment will be entered accordingly.

SO ORDERED.

DATED: October 7, 1998

/s/ Barefoot Sanders
BAREFOOT SANDERS
SENIOR U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Civil Action No. 3:97-CV-0638-H

DENISE ARGUELLO, et al.,
Plaintiffs

v.

CONOCO, INC.,
Defendant.

JUDGMENT

[Filed: October 7, 1998]

This Judgment is entered pursuant to the Court's Memorandum Opinion and Order, filed October 7, 1998.

IT IS ORDERED, ADJUDGED and DECREED by the Court that the Plaintiffs take nothing by their suit against the Defendant Conoco, Inc., and that this suit be, and it is hereby, **DISMISSED** with prejudice.

SIGNED this 7 day of October, 1998.

/s/ Barefoot Sanders
BAREFOOT SANDERS
SENIOR U.S. DISTRICT
COURT JUDGE
NORTHERN DISTRICT
OF TEXAS

APPENDIX C

CONOCO INC.
PETROLEUM MARKETER AGREEMENT

This Agreement, effective on the 1st day of April, 1993 ("Effective Date"), by and between Conoco Inc., a Delaware corporation (hereinafter called "Conoco"), and Classic Group, Inc. (hereinafter called "Marketer"), whose mailing address is 5840 W. Interstate 20, #280, City of Arlington, TX, Zip 76017.

WITNESSETH:

WHEREAS, Conoco is engaged in the business of oil exploration, refining and marketing under Conoco trademarks and trade names, and has made a significant investment over the years in developing quality products and promoting the Conoco trademarks and trade names; and

WHEREAS, Marketer recognizes that Conoco has a protectible business interest in ensuring that Marketer's distribution of Conoco-branded products under this Agreement will be accomplished in a manner which respects the high standards, reputation, and integrity of the Conoco trademarks and trade names which Conoco has created over the years; and

WHEREAS, Conoco's ability to recover its costs and investment in its relationship with Marketer are dependent on its sales of petroleum products to Marketer under this Agreement, it is specifically understood and agreed by Marketer that the minimum volume requirements are reasonable and of material significance to this Agreement, and Marketer further understands that Conoco may adjust said minimum volume requirement upon any renewal of this Agreement in order to

assure an economic relationship between Conoco and Marketer; and

WHEREAS, Conoco and Marketer desire to set out the terms and conditions under which Conoco shall sell to Marketer and Marketer shall purchase from Conoco various petroleum products for resale by Marketer to Marketer's customers under Conoco's trademark and trade names; and

WHEREAS, Marketer's failure to carry out its responsibilities hereunder jeopardize the reputation of Conoco, and Marketer acknowledges that adherence to the terms of this Agreement is a matter of mutual importance and consequence to Marketer, to Conoco, and to all other Conoco-branded marketers.

NOW, THEREFORE, In consideration of the mutual benefits to be derived by Conoco and Marketer from the execution of this Agreement, the parties hereto agree as follows:

1. Selling Rights. As long as this Agreement shall remain in effect, Marketer shall have the right to purchase from Conoco (according to the provisions of paragraph 13 and Exhibit "A" of this Agreement) and to sell to its customers petroleum products bearing the Conoco brand or certain other brands owned by Conoco (hereinafter called "Conoco products"). Subject to the terms of this Agreement, Marketer shall prominently display Conoco's trademarks and trade names and shall grant credit to holders of Conoco credit cards at its places of business where Conoco marketing standards are maintained.

Nothing contained herein shall be construed as granting Marketer an exclusive territory or an exclusive

group of customers. Conoco reserves the right to sell its products to any customer of its choosing.

2. Duration. This Agreement shall be effective for a term of three (3) years from the Effective Date of this Agreement.

A. Marketer shall have the absolute right to cancel this Agreement without cause at the end of the three (3) year term by giving Conoco written notice at least 3 but not more than 6 months in advance of such cancellation.

B. Conoco shall have the right not to renew this Agreement at the end of the term and the right to terminate this Agreement at any time during the term upon 90 days' written notice, or upon a lesser period of notice where 90 days' notice is unreasonable, for any of the grounds permitted by the Petroleum Marketing Practices Act.

3. Duties and Obligations of Conoco. Conoco shall sell to Marketer the quantities of Conoco products set forth in Exhibit "A" (and Exhibit "E" if Marketer is enrolled in the Conoco Truck Stop program). In connection therewith and pursuant to this Agreement, Conoco shall:

A. Permit Marketer to identify its operation as an authorized Conoco brand distributorship and, in this connection, and subject to paragraphs 4 and 5 and Exhibit "D," make available to Marketer and authorize it to display signs and insignia bearing Conoco trade names and/or Conoco trademarks. If Marketer uses Conoco's trademarks or trade names in conjunction with advertising, forms or upon any building, transport or dispensing equipment, then Marketer must properly identify itself as a "Products Jobber" or "Products Marketer" adjacent to Conoco's marks as follows: "Conoco Products Jobber (or Marketer)."

B. Make available to Marketer (upon Marketer's request) the advice and counsel of Conoco's experience relating to Marketer's operation, including retail operations.

C. Continue research and development necessary to maintain and improve the quality and performance of Conoco products to serve the motoring public.

D. Make available to Marketer, on such terms as Conoco and Marketer may agree and within the confines of existing laws and regulations, advertising and promotional materials, including materials Marketer may require to participate in such promotional plans as Conoco may undertake to sponsor, and materials necessary for participation in such promotional plans as Conoco may provide and Marketer may sponsor.

E. Accept assignment of Conoco credit card invoices, subject to the terms and conditions in the current Conoco Credit Card Guide for Dealers and Retail Stores, which may be revised from time to time or discontinued at Conoco's sole discretion.

4. Duties and obligations of Marketer. Consistent with the principles herein set forth, Marketer shall conduct its independent business operations consistent with the standards set forth below, which will promote the continuing good reputation of Conoco and all other Conoco marketers, and toward this end, Marketer shall:

A. Conduct its operation to provide efficient, courteous, and diligent service to retail dealers and other customers.

B. Use its best efforts to grow and strengthen the volume sales of Conoco products.

C. Seek prior approval for the locations and keep Conoco informed of current volume of its Conoco-branded retail outlets, as set forth in Exhibit "A".

D. Take all actions necessary and required by the Petroleum Marketing Practices Act to remove all signs and insignia bearing Conoco trade names and Conoco trademarks from any outlet which fails to meet the brand standards outlined under paragraph 4.H of this Agreement. If Marketer fails to remove such signs from such premises after notice, Conoco may enter and remove them at Marketer's expense.

E. Refuse to honor Conoco credit cards for purchases made at locations other than those approved by Conoco and shall not assign invoices to Conoco for sales or purchases made at outlets not previously approved by Conoco. Marketer shall accept and promptly reimburse Conoco for invoices refused by Conoco in accordance with the provisions of the current Credit Card Guide for Dealers and Retail Stores, which may be revised from time to time at Conoco's sole discretion.

F. Not, without Conoco's prior written consent, offer for sale nor sell any petroleum products under any of Conoco's brand, trademarks, service marks, or trade names, unless such products were purchased from Conoco. With Conoco's prior written consent, Marketer may sell other than Conoco petroleum products (But not "unbranded Conoco products") under the Conoco brands, trademarks, service marks, or trade names for limited periods, provided the other products meet Conoco's specifications, and Conoco shall have the right to test and inspect such other products. Marketer may not sell "unbranded Conoco products" under any of Conoco's brands, trademarks, service marks, or trade names,

even though such "unbranded Conoco products" are purchased from Conoco. Marketer shall use Conoco's brands, trademarks, service marks, or trade names only in a form and manner approved by Conoco, and shall not sell any products, whether purchased from Conoco or not, under any brand, trademark, service mark, or trade name which is confusingly similar to any Conoco brand, trademark, service mark, or trade name, or under any circumstances likely to cause confusion, mistake, or deception as to the origin, source, or sponsorship of the products.

G. Comply with the provisions of Exhibit "B," concerning the regulation of petroleum products pursuant to the Clean Air Act, as revised from time to time.

H. Permit such inspection of Marketer's business operations by Conoco, its employees and agents, as may reasonably be required to determine whether Marketer is in compliance with the Agreement.

I. Assure that Marketer and the operators or dealers of Marketer's Conoco-branded retail outlets shall comply with the following standards:

(1) A Conoco capsule sign must be displayed on the site visible to the motoring public.

(2) Credit must be granted to Conoco credit card holders, as outlines in the Credit Card Guide for Dealers and Retail Stores, and to holders of credit cards issued by other companies listed in the current Credit Card Guide and subject to the terms thereof.

(3) Each retail outlet must have and use Conoco's Credit Express Electronic Point-of-Sale System.

(4) Each retail outlet must prominently display and sell Conoco branded motor oils.

(5) Each retail outlet must meet Conoco's image requirement, set forth in the current Conoco Image Standards Manual, as revised from time to time.

(6) The entire retail outlet, including the grounds, must be clean, in good repair, and well maintained;

(7) Each retail outlet must complement the community and the environment;

(8) Each retail outlet must be operated with personnel who are well groomed and wear clean, appropriate apparel; and

(9) All customers must be treated fairly, honestly, and courteously.

(10) The Conoco trademark may only be used in connection with any advertising, distribution or sale of Conoco-branded products or other products selected by Conoco for sale under the Conoco trademark. Conoco unbranded gasoline shall not be sold under the Conoco trademark.

(11) Motor fuels may not be diluted, adulterated, misbranded or mislabeled.

(12) No alternative motor fuel as defined by the Energy Policy Act of 1992 shall be sold from a premises displaying the Conoco trademarks or trade names unless the alternative motor fuel is supplied by Conoco or by a supplier approved in writing by Conoco. Additionally, there is a separate agreement which must be executed before selling alternative motor fuels from a premises or dispenser displaying the Conoco trademarks or trade names.

Alternative fuels sold as non-motor fuels must not be in the Conoco trade dress, must not be sold from

the pump islands or in close proximity to the pump islands, and must be clearly marked with a non-Conoco trademark.

(13) Marketer, its employees and agents, and Conoco, its employees and agents, must be permitted to inspect Conoco-branded retail outlets supplied by Marketer as may be reasonably required to determine whether the retail outlets are in compliance with this Agreement.

(14) A signed Exhibit "C", (or a signed Exhibit "F" if Marketer is enrolled in the Conoco Truck Stop Program), of the Petroleum Marketer Agreement must be on file with Conoco for each Conoco-branded retail outlet supplied by Marketer and operated by a party other than Marketer.

(15) The operators or dealers of retail outlets shall comply with all applicable petroleum product regulations, including, without limitation, those set forth in Exhibit "B" of this Agreement, as revised from time to time.

(16) Each retail outlet must attain passing grades during periodic inspections on the Appearance/Merchandising Section of the Image Evaluation Report, attached hereto and made a part hereof as Exhibit "C-1." A retail outlet which fails to pass any portion of the Brand Requirements Section of the Image Evaluation Report will automatically fail the image inspection regardless of the number of points the retail outlet scored in the Appearance/Merchandising Section. Conoco reserves the right to amend the Image Evaluation Report at any time upon 30 days' written notice to Marketer.

(17) Any exception to the above standards in this Section I requires the written approval of the General Manager, Branded Marketing, Product Marketing, Supply & Transportation.

5. Use of Trademarks and Trade Names.

A. Conoco hereby gives Marketer permission to use Conoco's trademarks, trade names and brand names in conjunction with the sale of Conoco products. Marketer acknowledges and recognizes Conoco's interest in all its trademarks and trade names and the exclusive right of Conoco to control the use of these trademarks or trade names. Upon the termination or nonrenewal of this Agreement, Marketer shall immediately cease holding itself out to the public as a Conoco marketer; and upon such termination or nonrenewal, or the debranding for any reason of an individual retail outlet, Marketer shall immediately discontinue the use of trademarks and trade names of Conoco and remove from the premises and surrender to Conoco, at Marketer's risk and expense, any and all trademark and trade names identification, including credit card imprinters, which makes it appear that Marketer is an authorized Conoco-branded distributor. If Marketer fails to remove such Conoco brand identification from the premises, Conoco may enter and remove it at the expense of Marketer.

B. Marketer shall obtain prior written approval from a Conoco Branded Marketing Manager of all stations which Marketer intends to brand Conoco.

C. Marketer shall obtain for each Conoco-branded retail outlet supplied by Marketer and operated by a party other than Marketer, an executed copy of Exhibit "C", which is attached hereto and made a part hereof. Marketer shall return one copy of such exhibit to Conoco.

D. Conoco reserves the right at any time to change its product line and specifications, trade dress, trade names, and trademarks or to change or withdraw any services offered in connection with any products such as credit card acceptance. In the event of such change, Conoco shall be relieved of all obligation to sell such discontinued product, etc., to Marketer; and if Conoco shall market any other brand or product in lieu of the discontinued items, this Agreement shall embrace such new brands or products. Conoco shall not be liable to Marketer by reason of any such changes.

6. Financial Responsibility. When requested by Conoco, Marketer agrees to provide periodic financial statements, periodic business balance sheets, and income statements, in addition to applicable notes and schedules, and/or to furnish reasonable collateral, guarantees, and/or other security to support its line of credit. Marketer's failure to provide such financial information and/or collateral requested by Conoco may result in Conoco's denial of credit to Marketer. Furthermore, if in Conoco's judgment, Marketer's ability to pay/creditworthiness is unsatisfactory or deteriorates, or if Marketer fails to fulfill the payment terms, Conoco may without prejudice to any other lawful remedy, defer shipment until payment is made, deny credit and demand cash payment, or immediately terminate or non-renew this Agreement pursuant to paragraph 2.B hereunder. Nothing herein shall give Marketer the right to exceed any credit limit established for Marketer by Conoco. Payment terms are set forth in Exhibit A.

If Marketer fails to make a timely payment of any amount due, in accordance with the terms hereof, then Conoco shall, in addition to any other rights or remedies available to it, have the right, but not the obligation, to

recoup or set off against any amount then due to Marketer, including, but not limited to, any amounts due Marketer for the assignment to Conoco of credit card invoices pursuant to paragraph 3 hereof, up to the total amount outstanding.

EXECUTION OF THIS AGREEMENT BY CONOCO SHALL NOT CONSTITUTE APPROVAL OF A LINE OF CREDIT FOR MARKETER.

7. Taxes. Marketer shall pay to Conoco, in addition to applicable prices hereunder, any tax, license fee, inspection fee, or other charge imposed by any governmental authority or other agency on, or measured by gross receipts from, any products sold hereunder, or on the production, manufacture, transportation, sale, use, delivery or other handling of products or any component thereof, or on any feature thereof, or of this Agreement, existing at the time of any delivery hereunder, if such tax, fee or charge is required to be, or is in fact, paid by Conoco. Failure of Conoco to add any such tax, fee or charge to the invoice shall not relieve Marketer from liability therefor. Marketer shall reimburse Conoco for any interest and/or penalty assessed by any governmental authority or other agency when such penalty and/or interest is accrued as the result of false, incorrect or delinquent certification made to Conoco by Marketer.

8. Transfer of Franchise. This Agreement is personal to Marketer and assignable or transferable by Marketer only with the prior written consent of Conoco, which consent shall not be unreasonably withheld. Marketer understands, however, that Conoco may condition its consent to any assignment upon the agreement of the proposed assignee to: (1) enter into a Trial Franchise in conformity to the provisions of the Petroleum Marketing Practices Act; and (2) simultaneously therewith,

enter into a Mutual Cancellation of this Agreement. Refusal of the proposed assignee or transferee to enter into such Trial Franchise and Mutual Cancellation shall conclusively be adequate reason for Conoco to withhold its consent to the assignment.

9. Nonwaiver. Subject to the provisions of the Petroleum Marketing Practices Act and any other applicable provision of law, no delay, waiver, omission, or forbearance on the part of Conoco to the exercise of any right, duty, or power arising out of any breach or default by Marketer, or by any other jobber, of any of the terms, provisions, or covenants contained herein, shall constitute a waiver by Conoco to enforce any such right, option, or power against Marketer for any subsequent breach or default by Marketer.

EXECUTION OF THIS AGREEMENT BY CONOCO SHALL NOT CONSTITUTE AUTOMATIC APPROVAL OF THE IMAGE OF ANY CONOCO-BRANDED RETAIL OUTLET OR CONSTITUTE A WAIVER OF THE REQUIREMENT THAT EVERY CONOCO-BRANDED RETAIL OUTLET MUST COMPLY WITH CONOCO'S IMAGE STANDARDS, AS SET FORTH HEREIN.

10. Relationship of the Parties. Marketer is an independent business and is not, nor are its employees, an employee of Conoco. Conoco and Marketer are completely separate entities. They are not partners, general partners, limited partners, joint venturers, nor agents of each other in any sense whatsoever and neither has the power to obligate or bind the other.

Further, nothing herein contained is intended, nor shall it be construed as reserving to Conoco rights or powers to exercise control over the business practices of Marketer or to direct the manner in which its business

operations shall be conducted; except, Conoco may take reasonable actions to promote compliance with the standards set forth above and may provide such instructions, guidance, and recommendations as may be necessary and desirable to promote the mutual objectives of Conoco and Marketer, including the promotion of public goodwill toward Conoco, its trademarks and trade names, and the reputation of Conoco products. Conoco shall have no control whatsoever over Marketer's resale prices of the products purchased hereunder.

11. Severability. Any provision of this Agreement prohibited by law or by court decree in any locality or state shall be ineffective to the extent of such prohibition without in any way invalidating or otherwise affecting the remaining provisions of this Agreement within states and localities where not prohibited by law or court decree.

12. Notices. Any notice in connection with this Agreement shall be made in writing and sent by certified mail or delivered personally to Conoco at the office at 600 North Dairy Ashford, Houston, Texas 77079 or to General Manager, Branded Marketing, Product Marketing, Supply & Transportation, Post Office Box 4784, Houston, Texas 77219-4784, and to Marketer at the address above noted. The deposit in the United States mail of a properly addressed and postage pre-paid communication shall be deemed delivery to the party addressed.

Where the notice concerns termination or nonrenewal of this Agreement, the notice shall contain:

A. A statement of intention to terminate or not to renew, together with the reasons therefor;

B. The date on which such termination or nonrenewal will take effect; and

C. A copy of the Summary of Title I of the Petroleum Marketing Practices Act, prepared and published by the Secretary of Energy.

13. Terms of Delivery and Allocation. The sale by Conoco and purchase by Marketer of Conoco products shall be accomplished in accordance with Exhibit "A" (and Exhibit "E" if enrolled in the Conoco Truck Stop program). The amount of product to be supplied to Marketer shall be subject to any good faith allocation program which Conoco many find necessary to effect for any reason, including, but not limited to, shortage of product or government regulations. Conoco shall have the right to impose a surcharge on any gallons purchased which exceed Marketer's allocation.

In the event Conoco's inventory, ability to refine or sources of supply of crude petroleum or refined petroleum products are not sufficient to meet demand at Marketer's normal or assigned distribution points (regardless of whether Conoco may have diverted supply to other distribution points to alleviate shortages at such other distribution points), Conoco shall not be bound to acquire by purchase or otherwise additional quantities of crude petroleum or refined petroleum products from other suppliers or to take any other action which is uneconomic to Conoco. No allocation pursuant to this paragraph shall operate to extend the period of this Agreement and Conoco shall not be obligated to make available any quantities omitted due to any allocation program.

All orders will be filled with reasonable promptness but Conoco shall not be held responsible when deliveries

are delayed or prevented by fire, storm, flood, strikes, riots, wars or political disturbances in this or any other country, difference with or refusal of any employees of Conoco or of its agent or distributor to deliver, disruption or breakdown of transportation, or any cause beyond Conoco's control, whether of any class of causes referred to or not. If by reason of any said causes Conoco shall be unable to supply the requirements of all of its customers of any product covered hereby in the area in which sales are to be made hereunder, Conoco's obligation while such inability exists shall at its option be reduced with allocation in accordance with this paragraph.

Marketer will receive Conoco products from a supply point designated by Conoco and Conoco shall have the right at any time to change Marketer's designated supply point or to limit or otherwise control the volume of Marketer's Exhibit "A" volume which Conoco will make available at any supply point.

Marketer agrees to promptly unload, upon arrival at destination, all shipments made hereunder and to reimburse Conoco for any demurrage paid by Conoco resulting from Marketer's failure to do so. Marketer shall furnish Conoco shipping instructions sufficiently prior to date of shipment to allow ample time for delivery. All shipments shall be invoiced as of date shown on Bill of Lading. Invoices will be rendered on a net basis (normal temperature 60 degrees Fahrenheit with gallonage adjustments as provided for in the abridged Volume Correction Table for Petroleum Oils), or in accordance with any existing state law. In the absence of state law to the contrary, Marketer may elect annually, for each state where Marketer purchases products from Conoco, to purchase on a basis other than net, by mutual written agreement between Conoco and Marketer.

If Marketer transports its own product from the terminal or other supply point, Marketer shall qualify with Conoco or the terminal operator to enter on the premises and Marketer shall execute necessary documents. Minimum transport quantity shall be the minimum set by the terminal operator.

14. Gasoline Treated with Tetraethyl Lead, Tetramethyl Lead, or Other Mixed Lead Alkyla. Some or all of the brands of gasoline covered hereby have contained and are expected to contain an anti-knock compound, of which tetraethyl lead, tetramethyl lead or other mixed lead alkyla is an ingredient. Marketer agrees to comply with the rules and regulations in existence with respect to the handling, distribution, and sale of such gasoline and to require each subsequent purchaser for resale from Marketer to assume a similar obligation.

15. Previous Agreements. This Agreement supersedes all prior and current Jobber Franchise Agreements and/or Petroleum Marketer Agreements between the parties and it contains each and every understanding of the parties relating to the subject covered hereby. No verbal representations, statements or agreements of any nature relating to the subject matter of this Agreement or to any relationship between the parties will be considered valid or enforceable.

16. Indemnity. Marketer hereby agrees to indemnify, defend and hold Conoco, and its affiliates, officers, directors, employees, agents, and representatives, harmless from any and all claims, demands, suits, actions or other loss or liability, including all reasonable attorney's fees and legal expenses, fines, and penalties, arising out of any claim or cause of action at law or in equity, or any administrative or judicial action, concerning or relating

to any loss, loss of use of, remediation of, or damage to property or natural resources (including, but not limited to, that arising from storage tank leaks or spills, waste disposal, or air emissions), personal injuries, death, violation of any governmental laws, regulations, or orders or patent or trademark infringement or environmental claims arising in any manner from Marketer's operation, including but not limited to, Marketer's loading, transportation, unloading, storage, handling, sale, or use of Conoco products sold hereunder, or Marketer's performance or failure to perform under this Agreement, whether or not Marketer was negligent or otherwise at fault. Provided, however, such indemnification obligations shall not apply to claims for loss, damage, injury or death:

A. To the extent Marketer proves them to have been caused by Conoco's negligence or willful misconduct, or

B. When caused by defects in the Conoco product not caused or contributed to by any act or omission of Marketer or Marketer's employees or agents.

Conoco shall have the right, but not the duty, to participate in the defense of any claim or litigation with attorneys of Conoco's selection. Marketer's obligations hereunder shall survive any termination of this Agreement.

17. Warranties. Conoco warrants that the products it delivers hereunder shall meet Conoco's then current product specifications for the respective products and shall be in merchantable conditions. UNDER NO CIRCUMSTANCES SHALL CONOCO BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, SPECIAL, OR PUNITIVE DAMAGES.

18. Marketer Claims/Lawsuits. Conoco shall not be liable to Marketer for breach of this Agreement or for any other claim by Marketer, unless Marketer provides Conoco with written notice of the incident (which forms the basis of the alleged breach or claim) within 90 days of the occurrence of the incident and files suit within 1 year after the occurrence of the incident.

Notwithstanding the above paragraph, Conoco shall not be liable to Marketer for any defect in quality or shortage in quantity of any product delivered hereunder unless (a) Marketer notifies Conoco of Marketer's claim within 48 hours after delivery thereof, or in the case of any latent defect in quality, within 48 hours after Marketer's discovery of such defect, and (b) Conoco is given a reasonable opportunity to inspect the product and to take and test samples thereof. Marketer's failure to specify any shortage, defect or nonconformity shall constitute a waiver of that defect or nonconformity. Every notice of claim shall set forth fully the facts on which the claim is based.

19. Amendment. Except as otherwise specified herein, this Agreement can only be amended by an agreement in writing which is signed by both parties.

20. Choice of Law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Delaware.

21. Exhibits. Exhibits "A" through "D" (and Exhibits "E" and "F", if enrolled in the Conoco Truck Stop Program), are attached hereto and are made a part of this Agreement.

22. No Unspecified Third Party Beneficiary. Except as specifically provided in this Agreement (*e.g.* in para-

graph 15), there are no third party beneficiaries of this Agreement.

23. Binding Effect. This Agreement shall inure to the benefit of and be binding upon the heirs, executors, administrators, successors, and assigns of the respective parties hereto.

24. Petroleum Marketing Practices Act. Conoco and Marketer hereby expressly reserve their rights under the Petroleum Marketing Practices Act (15 U.S.C. 2801 et seq.). No omission of any reference herein to any such specific right shall constitute a waiver.

25. Special Conditions.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the date first above written.

For Reference Only:

This Petroleum Marketer Agreement was discussed in its entirety with Marketer by:

_____

Name of Employee

CONOCO INC.

By: /s/ (illegible)
Title: Branded Mktg Mgr.

Classic Group, Inc.

By: Calvin Zuber
(Name Printed)
Signature: /s/ Calvin S. Zuber
Title: CEO

CONOCO INC.
PETROLEUM MARKETER AGREEMENT

This Agreement, effective on the 1st day of April, 1996 ("Effective Date"), by and between Conoco Inc., a Delaware corporation (hereinafter called "Conoco"), and CLASSIC GROUP, INC. (hereinafter called "Marketer"), whose mailing address is 6031 WEST I-20, City of ARLINGTON, TX, Zip 76017.

WITNESSETH:

WHEREAS, Conoco is engaged in the business of oil exploration, refining and marketing under Conoco trademarks and trade names, and has made a significant investment over the years in developing quality products and promoting the Conoco trademarks and trade names; and

WHEREAS, Marketer recognizes that Conoco has a protectible business interest in ensuring that Marketer's distribution of Conoco-branded products under this Agreement will be accomplished in a manner which respects the high standards, reputation, and integrity of the Conoco trademarks and trade names which Conoco has created over the years; and

WHEREAS, Conoco's ability to recover its costs and investment in its relationship with Marketer are dependent on its sales of petroleum products to Marketer under this Agreement, it is specifically understood and agreed by Marketer that the minimum volume requirements are reasonable and of material significance to this Agreement, and Marketer further understands that Conoco may adjust said minimum volume requirement upon any renewal of this Agreement in order to assure an economic relationship between Conoco and Marketer; and

WHEREAS, Conoco and Marketer desire to set out the terms and conditions under which Conoco shall sell to Marketer and Marketer shall purchase from Conoco various petroleum products for resale by Marketer to Marketer's customers under Conoco's trademark and trade names; and

WHEREAS, Marketer's failure to carry out its responsibilities hereunder jeopardize the reputation of Conoco, and Marketer acknowledges that adherence to the terms of this Agreement is a matter of mutual importance and consequence to Marketer, to Conoco, and to all other Conoco-branded marketers.

NOW, THEREFORE, In consideration of the mutual benefits to be derived by Conoco and Marketer from the execution of this Agreement, the parties hereto agree as follows:

1. Selling Rights. As long as this Agreement shall remain in effect, Marketer shall have the right to purchase from Conoco (according to the provisions of Section 13 and Exhibit "A" of this Agreement) and to sell to its customers petroleum products bearing the Conoco brand or certain other brands owned by Conoco (hereinafter called "Conoco products"). Subject to the terms of this Agreement, Marketer shall prominently display Conoco's trademarks and trade names and shall grant credit to holders of Conoco credit cards at its places of business where Conoco marketing standards are maintained.

NOTHING CONTAINED HEREIN SHALL BE CONSTRUED AS GRANTING MARKETER AN EXCLUSIVE TERRITORY OR AN EXCLUSIVE GROUP OF CUSTOMERS. CONOCO RESERVES THE RIGHT TO SELL ITS PRODUCTS TO ANY CUSTOMER OF ITS CHOOSING.

2. Duration. This Agreement shall be effective for a term of three (3) years from the Effective Date of this Agreement.

A. Marketer shall have the absolute right to cancel this Agreement without cause at the end of the three (3) year term by giving Conoco written notice at least 3 months in advance of such cancellation.

B. Conoco shall have the right not to renew this Agreement at the end of the term and the right to terminate this Agreement at any time during the term upon 90 days' written notice, or upon a lesser period of notice where 90 days' notice is unreasonable, for any of the grounds permitted by the Petroleum Marketing Practices Act.

3. Duties and Obligations of Conoco. Conoco shall sell to Marketer the quantities of Conoco products set forth in Exhibit "A." In connection therewith and pursuant to this Agreement, Conoco shall:

A. Permit Marketer to identify its operation as an authorized Conoco brand distributorship and, in this connection, and subject to Sections 4 and 5 and Exhibit "D," make available to Marketer and authorize it to display signs and insignia bearing Conoco trade names and/or Conoco trademarks. If Marketer uses Conoco's trademarks or trade names in conjunction with advertising, forms or upon any building, transport or dispensing equipment, then Marketer must properly identify itself as a "Products Jobber" or "Products Marketer" adjacent to Conoco's marks as follows: "Conoco Products Jobber (or Marketer)."

B. Make available to Marketer (upon Marketer's request) the advice and counsel of Conoco's experience relating to Marketer's operations.

C. Continue research and development necessary to maintain and improve the quality and performance of Conoco products to serve the motoring public.

D. Make available to Marketer, on such terms as Conoco and Marketer may agree and within the confines of existing laws and regulations, advertising and promotional materials, including materials Marketer may require to participate in such promotional plans as Conoco may undertake to sponsor, and materials necessary for participation in such promotional plans as Conoco may provide and Marketer may sponsor.

E. Accept assignment of Conoco credit card invoices, subject to the terms and conditions in the Conoco Credit Card Guide for Dealers and Retail Stores, which in incorporated herein by this reference, and which may be revised from time to time or discontinued at Conoco's sole discretion ("Credit Card Guide").

4. Duties and obligations of Marketer. Consistent with the principles herein set forth, including but not limited to Section 14 of this Agreement, Marketer shall conduct its independent business operations consistent with the standards set forth below, which will promote the continuing good reputation of Conoco and all other Conoco marketers, and toward this end, Marketer shall:

A. Conduct its operation to provide efficient, courteous, and diligent service to retail dealers and other customers.

B. Subject to Section 5B, of this Agreement, use its best efforts to grow and strengthen the volume sales of Conoco products.

C. Comply with Conoco's requirements for the use of Conoco trademarks and trade names, as set forth in Section 5 of this Agreement.

D. Refuse to honor Conoco credit cards for purchases made at locations other than those approved by Conoco and listed on Exhibit A-1, and shall not assign invoices to Conoco for sales or purchases made at outlets not previously approved by Conoco. Marketer shall accept and promptly reimburse Conoco for invoices refused by Conoco in accordance with the provisions of the Credit Card Guide.

E. Not, without Conoco's prior written consent, offer for sale nor sell any petroleum products under any of Conoco's brand, trademarks, service marks, or trade names, unless such products were purchased from Conoco. With Conoco's prior written consent, Marketer may sell other than Conoco petroleum products (But not "unbranded Conoco products") under the Conoco brands, trademarks, service marks, or trade names for limited periods, provided the other products meet Conoco's specifications, and Conoco shall have the right to test and inspect such other products. Marketer may not sell "unbranded Conoco products"' under any of Conoco's brands, trademarks, service marks, or trade names, even though such "unbranded Conoco products" are purchased from Conoco. Marketer shall use Conoco's brands, trademarks, service marks, or trade names only in a form and manner approved by Conoco, and shall not sell any products, whether purchased from Conoco or not, under any brand, trademark, service mark, or trade name which is confusingly similar to any Conoco brand, trademark, service mark, or trade name, or under any circumstances likely to cause confusion, mistake, or deception as to the origin, source, or sponsorship of the products.

F. Comply with the provisions of Exhibit "B," concerning the regulation of petroleum products pursuant to the Clean Air Act, as revised from time to time.

G. Comply with the provisions of Conoco's Programs and Image Standards Manuals, which are incorporated herein by this reference, and which may be revised from time to time at Conoco's sole discretion.

H. Ensure to Conoco that Marketer and the operators or dealers of Conoco-branded retail outlets supplied by Marketer comply with the following standards:

(1) Each retail outlet much meet Conoco's Image requirements:

(a) Each retail outlet shall comply with the Conoco Image standards set forth in the Conoco Image Standards Manual, as revised from time to time, and incorporated herein by this reference;

(b) The entire retail outlet, including the grounds, must be clean, in good repair, and well maintained;

(c) Each retail outlet must complement the community and the environment;

(d) Each retail outlet must be operated with personnel who are well groomed and wear clean, appropriate apparel; and

(e) All customers must be treated fairly, honestly, and courteously.

(2) Credit must be granted to Conoco credit card holders, as outlined in the Credit Card Guide, and to holders of credit cards issued by other companies listed in said Credit Card Guide, and subject to the terms thereof.

(3) Each retail outlet must have and use Conoco's Credit Express Electronic Point-of-Sale System.

(4) Each retail outlet must prominently display and sell Conoco branded motor oils.

(5) The Conoco trademark may only be used in connection with any advertising, distribution or sale of Conoco-branded products or other products selected by Conoco for sale under the Conoco trademark. Conoco unbranded gasoline shall not be sold under the Conoco trademark.

(6) Motor fuels may not be diluted, adulterated, misbranded or mislabeled.

(7) No alternative motor fuel as defined by the Energy Policy Act of 1992 shall be sold from a premises displaying the Conoco trademarks or trade names unless the alternative motor fuel is supplied by Conoco or by a supplier approved in writing by Conoco. Additionally, there is a separate agreement which must be executed before selling alternative motor fuels from a premises or dispenser displaying the Conoco trademarks or trade names.

Alternative fuels sold as non-motor fuels must not be in the Conoco trade dress, must not be sold from the pump islands or in close proximity to the pump islands, and must be clearly marked with a non-Conoco trademark.

(8) Marketer, its employees and agents, and Conoco, its employees and agents, must be permitted to inspect Conoco-branded retail outlets supplied by Marketer as may be reasonably required to determine whether the retail outlets are in compliance with this Agreement.

(9) A signed Exhibit "C" of the Petroleum Marketer Agreement must be on file with Conoco for each

Conoco-branded retail outlet supplied by Marketer and operated by a party other than Marketer.

(10) The operators or dealers of retail outlets shall comply with all applicable petroleum product regulations, including, without limitation, those set forth in Exhibit "B" of this Agreement, as revised from time to time.

(11) Each retail outlet must attain passing grades during periodic inspections on the Appearance/Merchandising Section of the Image Evaluation Report, attached hereto and made a part hereof as Exhibit "C-1." A retail outlet which fails to pass any portion of the Brand Requirements Section of the Image Evaluation Report will automatically fail the image inspection regardless of the number of points the retail outlet scored in the Appearance/Merchandising Section. Conoco reserves the right to amend the Image Evaluation Report at any time upon 30 days' written notice to Marketer.

(12) Any exception to the above standards in this Section 4.H, requires the written approval of the appropriate Branded Marketing Manager.

5. Use of Trademarks and Trade Names.

A. Conoco hereby gives Marketer permission to use Conoco's trademarks, trade names and brand names in conjunction with the sale of Conoco products. Marketer acknowledges and recognizes Conoco's interest in all its trademarks and trade names and the exclusive right of Conoco to control the use of these trademarks or trade names. Upon the termination or nonrenewal of this Agreement, Marketer shall immediately cease holding itself out to the public as a Conoco marketer; and upon

such termination or nonrenewal, or the debranding for any reason of an individual retail outlet, Marketer shall immediately discontinue the use of trademarks and trade names of Conoco and remove from the premises and surrender to Conoco, at Marketer's risk and expense, any and all trademark and trade names identification, including credit card imprinters, which makes it appear that Marketer is an authorized Conoco-branded distributor. If Marketer fails to remove such Conoco brand identification from the premises, Conoco may enter and remove it at the expense of Marketer, including any reasonable attorneys' fees and costs.

B. Marketer shall obtain prior written approval from a Conoco Marketing Manager - Wholesale or Regional Sales Manager of all retail outlets which Marketer desires to brand Conoco, and keep Conoco informed of the current volumes of its Conoco-branded retail outlets, set forth on Exhibit "A-1." Marketer acknowledges Conoco's right to approve or disapprove the branding of any retail outlet in its sole discretion.

C. Marketer shall obtain for each Conoco-branded retail outlet supplied by Marketer and operated by a party other than Marketer, an executed copy of Exhibit "C." Marketer shall return one copy of such exhibit to Conoco.

D. Conoco reserves the right at any time to change its product line and specifications, trade dress, trade names, and trademarks or to change or withdraw any services offered in connection with any products such as credit card acceptance. In the event of such change, Conoco shall be relieved of all obligation to sell such discontinued product, etc., to Marketer; and if Conoco shall market any other brand or product in lieu of the

discontinued items, this Agreement shall embrace such new brands or products. Conoco shall not be liable to Marketer by reason of any such changes.

6. Product Identification.

A. Marketer may only use the Conoco trademark in connection with any advertising, distribution or sale of Conoco-branded products or other products selected by Conoco for sale under the Conoco trademark.

B. Marketer may not dilute, adulterate, misbrand or mislabel motor fuels sold hereunder.

C. Marketer agrees not to sell any Gasoline or Distillate under the Conoco brand which does not contain the additives which are required by Conoco at any given time.

D. Marketer understands and agrees that no branded gasolines or distillates shall be sold hereunder unless previously approved by Conoco in writing.

7. Price. For Gasoline or Distillate sold and/or delivered hereunder, Marketer shall pay Conoco's established branded marketer rack price or such other price, as Conoco deems appropriate and in effect for such Gasoline or Distillate on the date of such delivery, subject to the provisions regarding imposition of federal, state, or local taxes, license fees, inspection fees, or other charges imposed by any governmental authority or agency. Discounts, when applicable, will be allowed on the amount of the invoice less all such taxes, fees or charges.

8. Payment Terms.

A. Normal payment terms apply for so long as Marketer is approved by Conoco for a line of credit.

Normal payment terms hereunder shall be Conoco's established payment terms for Gasoline and Distillate sold to branded marketers, as established from time to time. Assigned credit card invoices shall be automatically applied to Marketer's outstanding account balance for product purchases and other amounts owing to Conoco. All payments and other fees or charges due from Marketer shall be made through and in accordance with Conoco's Preauthorized Payment System (Electronic Funds Transfer or "EFT") or in a manner otherwise designated by Conoco.

B. Normal payment terms do not apply to purchases that cause Marketer to exceed its approved credit limit. Notwithstanding payment terms printed on any invoice, if the outstanding account balance exceeds the credit limit, payment terms for the overlimit amount shall be immediate payment in advance of due dates, unless Conoco's Treasury department approves a temporary higher credit limit. The payment shall be made by wire transfer in an amount sufficient to bring the balance with the credit limit.

C. Conoco may assess a delinquency charge on all overdue sums owing to Conoco. Such delinquency charge shall be determined in accordance with applicable law.

D. If Conoco refers Marketer's account for collection, Marketer agrees to pay all collection costs permitted by applicable law, including any and all reasonable attorneys' fees, court costs, and allowable interest necessary to secure collection, in addition to the outstanding balance. In the event this Agreement is terminated for nonpayment or for failure to pay timely all sums due Conoco, then no liability shall exist for any undelivered products hereunder.

9. Financial Responsibility. When requested by Conoco, Marketer agrees to provide periodic financial statements, periodic business balance sheets, and income statements, in addition to applicable notes and schedules, and other information necessary for Conoco to render a decision on a line of credit, and/or to furnish reasonable collateral, guarantees, and/or other security to support a line of credit. Provided, however, nothing herein shall give Marketer the right to receive credit, unless it is expressly granted by Conoco. Similarly, nothing herein shall give Marketer the right to exceed any credit limit established for Marketer by Conoco.

Marketer's failure to provide such financial information and/or collateral requested by Conoco may result in Conoco's denial of credit to Marketer. Furthermore, if in Conoco's judgment, Marketer's ability to pay/creditworthiness is unsatisfactory or deteriorates, or if Marketer fails to fulfill the payment terms, Conoco may without prejudice to any other lawful remedy, defer shipment until payment is made, deny credit and demand cash payment, or immediately terminate or nonrenew this Agreement pursuant to paragraph 2.B hereunder.

If Marketer fails to make a timely payment of any amount due, in accordance with the terms hereof, then Conoco shall, in addition to any other rights or remedies available to it, have the right, but not the obligation, to recoup or set off against any amount then due to Marketer, including, but not limited to, any amounts due Marketer for the assignment to Conoco of credit card invoices pursuant to paragraph 3 hereof, up to the total amount outstanding.

EXECUTION OF THIS AGREEMENT BY CONOCO SHALL NOT CONSTITUTE APPROVAL OF A LINE OF CREDIT FOR MARKETER.

10. Taxes. Marketer shall pay to Conoco, in addition to applicable prices hereunder, any tax, license fee, inspection fee, or other charge imposed by any governmental authority or other agency on, or measured by gross receipts from, any products sold hereunder, or on the production, manufacture, transportation, sale, use, delivery or other handling of products or any component thereof, or on any feature thereof, or of this Agreement, existing at the time of any delivery hereunder, if such tax, fee or charge is required to be, or is in fact, paid by Conoco. Failure of Conoco to add any such tax, fee or charge to the invoice shall not relieve Marketer from liability therefor, Marketer shall reimburse Conoco for any interest and/or penalty assessed by any governmental authority or other agency when such penalty and/or interest is accrued as the result of false, incorrect or delinquent certification made to Conoco by Marketer.

11. Right to Inspect. Marketer shall permit such Inspection of Marketer's business operations by Conoco, its employees and agents, as may reasonably be required to determine whether Marketer is in compliance with the Agreement. To ensure the integrity of Conoco-branded products, Conoco reserves the right to take samples and to inspect bills of lading and other relevant business records during business hours at Marketer's place of business or at each retail unit supplied by Marketer hereunder with Conoco-branded products.

12. Transfer of Agreement. This Agreement is personal to Marketer and assignable or transferable by Marketer only with the prior written consent of Conoco,

which consent shall not be unreasonably withheld. Marketer understands, however, that Conoco may condition its consent to any assignment upon the agreement of the proposed assignee to: (1) enter into a Trial Franchise in conformity to the provisions of the Petroleum Marketing Practices Act; and (2) simultaneously therewith, enter into a Mutual Cancellation of this Agreement. Refusal of the proposed assignee or transferee to enter into such Trial Franchise and Mutual Cancellation shall conclusively be adequate reason for Conoco to withhold its consent to the assignment.

13. Nonwaiver. Subject to the provisions of the Petroleum Marketing Practices Act and any other applicable provision of law, no delay, waiver, omission, or forbearance on the part of Conoco to the exercise of any right, duty, or power arising out of any breach or default by Marketer, or by any other marketer, of any of the terms, provisions, or covenants contained herein, shall constitute a waiver by Conoco to enforce any such right, option, or power against Marketer for any subsequent breach or default by Marketer.

EXECUTION OF THIS AGREEMENT BY CONOCO SHALL NOT CONSTITUTE AUTOMATIC APPROVAL OF THE IMAGE OF ANY CONOCO-BRANDED RETAIL OUTLET OR CONSTITUTE A WAIVER OF THE REQUIREMENT THAT EVERY CONOCO-BRANDED RETAIL OUTLET MUST COMPLY WITH CONOCO'S IMAGE STANDARDS, AS SET FORTH HEREIN.

14. Relationship of the Parties. Marketer is an independent business and is not, nor are its employees, an employee of Conoco. Conoco and Marketer are completely separate entities. They are not partners, general partners, limited partners, joint venturers, nor agents

of each other in any sense whatsoever and neither has the power to obligate or bind the other.

Further, nothing herein contained is intended, nor shall it be construed as reserving to Conoco rights or powers to exercise control over the business practices of Marketer or to direct the manner in which its business operations shall be conducted; except, Conoco may take reasonable actions to promote compliance with the standards set forth above and may provide such instructions, guidance, and recommendations as may be necessary and desirable to promote the mutual objectives of Conoco and Marketer, including the promotion of public goodwill toward Conoco, its trademarks and trade names, and the reputation of Conoco products. Conoco shall have no control whatsoever over Marketer's resale prices of the products purchased hereunder.

15. Severability. Any provision of this Agreement prohibited by law or by court decree in any locality or state shall be ineffective to the extent of such prohibition without in any way invalidating or otherwise affecting the remaining provisions of this Agreement within states and localities where not prohibited by law or court decree.

16. Notices. Any notice in connection with this Agreement shall be made in writing and sent by certified mail or delivered personally to Conoco at the office of the appropriate business region Branded Marketing Manager at one of the following addresses:

a) P.O. Box 4784
Houston, TX 77210-4784

b) 1000 South Pine, 5200 C8
Ponca City, OK 74603

c) 6855 South Havana St., Suite 600
Englewood, CO 80112,

and to Marketer at the address above noted. The deposit in the United States mail of a properly addressed and postage pre-paid communication shall be deemed delivery to the party addressed.

Where the notice concerns termination or nonrenewal of this Agreement, the notice shall contain:

A. A statement of intention to terminate or not to renew, together with the reasons therefor;

B. The date on which such termination or nonrenewal will take effect; and

C. A copy of the Summary of Title I of the Petroleum Marketing Practices Act, prepared and published by the Secretary of Energy.

17. Terms of Delivery and Allocation. The sale by Conoco and purchase by Marketer of Conoco products shall be accomplished in accordance with Exhibit "A." The amount of product to be supplied to Marketer shall be subject to any good faith allocation program which Conoco many find necessary to effect for any reason, including, but not limited to, shortage of product or government regulations. Conoco shall have the right to impose a surcharge on any gallons purchased which exceed 100% of Marketer's allocation.

In the event Conoco's inventory, ability to refine or sources of supply of crude petroleum or refined petroleum products are not sufficient to meet demand at Marketer's normal or assigned distribution points (regardless of whether Conoco may have diverted supply to other distribution points to alleviate shortage at such

other distribution points), Conoco shall not be bound to acquire by purchase or otherwise additional quantities of crude petroleum or refined petroleum products from other suppliers or to take any other action which is uneconomic to Conoco. No allocation pursuant to this paragraph shall operate to extend the period of this Agreement and Conoco shall not be obligated to make available any quantities omitted due to any allocation program.

All orders will be filled with reasonable promptness but Conoco shall not be held responsible when deliveries are delayed or prevented by fire, storm, flood, strikes, riots, wars or political disturbances in this or any other country, difference with or refusal of any employees of Conoco or of its agent or distributor to deliver, disruption or breakdown of transportation, or any cause beyond Conoco's control, whether of any class of causes referred to or not. If by reason of any said causes Conoco shall be unable to supply the requirements of all of its customers of any product covered hereby in the area in which sales are to be made hereunder, Conoco's obligation while such inability exists shall at its option be reduced with allocation in accordance with this paragraph.

Marketer will receive Conoco products from a supply point designated by Conoco and Conoco shall have the right at any time to change Marketer's designated supply point or to limit or otherwise control the volume of Marketer's Exhibit "A" volume which Conoco will make available at any supply point.

All shipments shall be invoiced as of date shown on Bill of Lading. Invoices will be rendered on a net basis (normal temperature 60 degrees Fahrenheit with gal-

lonage adjustments as provided for in the abridged Volume Correction Table for Petroleum Oils), or in accordance with any existing state law. In the absence of state law to the contrary, Marketer may elect annually, for each state where Marketer purchases products from Conoco, to purchase on a basis other than net, by mutual written agreement between Conoco and Marketer.

If Marketer transports its own product from the terminal or other supply point, Marketer shall qualify with Conoco or the terminal operator to enter on the premises and Marketer shall execute necessary documents. Minimum transport quantity shall be the minimum set by the terminal operator.

18. Previous Agreements. This Agreement supersedes all prior and current Jobber Franchise Agreements and/or Petroleum Marketer Agreements between the parties and it contains each and every understanding of the parties relating to the subject covered hereby. No verbal representations, statements or agreements of any nature relating to the subject matter of this Agreement or to any relationship between the parties will be considered valid or enforceable.

19. Indemnity. Marketer hereby agrees to indemnify, defend and hold Conoco, and its affiliates, officers, directors, employees, agents, and representatives, harmless from any and all claims, demands, suits, actions or other loss or liability, including all reasonable attorney's fees and legal expenses, fines, and penalties, arising out of any claim or cause of action at law or in equity, or any administrative or judicial action, concerning or relating to any loss, loss of use of, remediation of, or damage to property or natural resources (including, but not limited to, that arising from storage tank leaks or spills,

waste disposal, or air emissions), personal injuries, death, violation of any governmental laws, regulations, or orders or patent or trademark infringement or environmental claims arising in any manner from Marketer's operation, including but not limited to, Marketer's loading, transportation, unloading, storage, handling, sale, or use of Conoco products sold hereunder, or Marketer's performance or failure to perform under this Agreement, whether or not Marketer was negligent or otherwise at fault. Provided, however, such indemnification obligations shall not apply to claims for loss, damage, injury or death:

A. To the extent Marketer proves them to have been caused by Conoco's negligence or willful misconduct, or

B. When caused by defects in the Conoco product not caused or contributed to by any act or omission of Marketer or Marketer's employees or agents.

Conoco shall have the right, but not the duty, to participate in the defense of any claim or litigation with attorneys of Conoco's selection. Marketer's obligations hereunder shall survive any termination of this Agreement.

20. Warranties. Conoco warrants that the products it delivers hereunder shall meet Conoco's then current product specifications for the respective products and shall be in merchantable conditions. UNDER NO CIRCUMSTANCES SHALL CONOCO BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, SPECIAL, OR PUNITIVE DAMAGES.

21. Marketer Claims/Lawsuits. Conoco shall not be liable to Marketer for breach of this Agreement or for

any other claim by Marketer, unless Marketer provides Conoco with written notice of the incident (which forms the basis of the alleged breach or claim) within 90 days of the occurrence of the incident and files suit within 1 year after the occurrence of the incident.

Notwithstanding the above paragraph, Conoco shall not be liable to Marketer for any defect in quality or shortage in quantity of any product delivered hereunder unless (a) Marketer notifies Conoco of Marketer's claim within 48 hours after delivery thereof, or in the case of any latent defect in quality, within 48 hours after Marketer's discovery of such defect, and (b) Conoco is given a reasonable opportunity to inspect the product and to take and test samples thereof. Marketer's failure to specify any shortage, defect or nonconformity shall constitute a waiver of that defect or nonconformity. Every notice of claim shall set forth fully the facts on which the claim is based.

22. Amendment. Except as otherwise specified herein, this Agreement can only be amended by an agreement in writing which is signed by both parties.

23. Exhibits. Exhibits "A" through "D" are attached hereto and are made a part of this Agreement.

24. No Unspecified Third Party Beneficiary. Except as specifically provided in this Agreement (*e.g.* in Section 19), there are no third party beneficiaries of this Agreement.

25. Binding Effect. This Agreement shall inure to the benefit of and be binding upon the heirs, executors, administrators, successors, and assigns of the respective parties hereto.

26. Petroleum Marketing Practices Act. Conoco and Marketer hereby expressly reserve their rights under the Petroleum Marketing Practices Act (15 U.S.C. 2801 et seq.). No omission of any reference herein to any such specific right shall constitute a waiver.

27. Special Conditions.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the date first above written.

CONOCO INC.

By: /s/ Judy (illegible)
Title: Acting Marketing Manager, Wholesale Branded Marketing, Gulf Coast

CLASSIC GROUP, INC.

By: Calvin S. Zuber
(Name Printed)
Signature: /s/ Calvin S. Zuber
Title: CEO

APPENDIX D

Interoffice Communication

To: W.R. (Bill) Gover, Manager, Branded Marketing, North America

From: J.W. (Jim) Nokes, Vice President, Refining & Marketing, North America

Date: April 4, 1997

Subject: CUSTOMER SERVICE

As you know, Conoco is anticipating a North Texas lawsuit charging the company with discrimination against customers.

Over the last couple of years, we have made great efforts developing enhanced training and recruitment programs. We believe the current program for owned store personnel is among the best in the industry. We also are proud that we conduct ourselves as a highly principled company.

I am embarrassed and furious, as I know you are, to think that customers at certain Conoco owned or branded stores in Texas may have been mistreated by store personnel. I will be disgusted if the reported allegations of ethnic insults prove correct.

These allegations are in the form of a lawsuit, so they are not proved. Nonetheless, it is my judgment that the allegations merit action by Conoco and will, at minimum, give us an opportunity to learn how we can further improve customer relations.

I want you to supervise a program that accomplishes the following as quickly as possible:

• A panel of current and former Conoco employees - including employees representing minorities - should thoroughly analyze documented allegations of improper customer treatment at Gulf Coast Conoco owned or branded stores over the past two years. This panel should begin work immediately and report its findings and recommendations directly to me within 10 days. This panel also is empowered to review Conoco's customer complaint handling process and recommend improvements it believes will help our performance.

• I want you to take appropriate action against any employee or business associate, within legal limits, who is found to have mistreated a customer for any reason, up to and including termination of an employee and/or debranding of a store.

• I want you, personally, to visit the North Texas area and meet with community leaders representative of the minority classifications at interest in these allegations. These leaders should be fully briefed and their inputs should be requested as to how we can do a better job of satisfying customers.

• Because these allegations were first published in the Dallas media, you should also meet with the media to publicly explain the facts as we know them and to outline steps taken or planned.

• In both instances, I want it understood that Conoco does not tolerate the alleged behavior by employees at any of its branded stores. Further, and particularly in light of our deeply held values, I want everyone to know how personally disturbing we find these allegations.

All customers who choose to do business with Conoco have a right to be treated courteously and fairly. I have

absolutely no tolerance for behavior outside those expectations.

This course of action is supported by all of Conoco's senior management, including the CEO. Please inform me when the above steps have been completed and to what results.

Bill, this is a very important issue, which I request you give your highest priority. I have every confidence that you will ensure that we learn from this experience and that it will result in further improved customer relations. If you encounter any obstacles in carrying out these instructions, please let me know.

/s/ Jim W. Nokes

APPENDIX E

* * *

[55]

not by mutual consent.

A. Or, that were not related to the marketer's unilateral decision to leave?

Q. Yes.

Or, in other words, where it was Conoco's decision to debrand a store.

A. Do you have a specific one you want me to talk about?

Q. No.

I am asking you for the numbers.

A. Okay.

Q. How many have you seen in your current position?

A. Approximately nine.

Q. And do you recall any of the reasons why Conoco debranded any of those stores?

A. Yes.

Q. Okay. What were the reasons?

A. I cannot specifically tell you, of the nine, how many fell in each category.

Q. Sure.

A. There were volume-related failures.

Q. Volume-related failures would be related to Exhibit A, is that right?

A. That's correct.

[56]

Q. That's Exhibit A of the PMA; is that right?

A. That's correct.

Q. Okay. Anything else?

A. Product adulteration.

Q. Is that related to the Section 5 of the PMA?

A. It's related specifically to the PMPA.

I cannot tell you where that reference may or may not fall in the PMA.

Q. All right. Let me draw your attention to page 2 of Exhibit 1 to your deposition.

Let's go ahead and have that marked, if you don't mind.

(Whereupon, a document was marked Scott Exhibit 2 for identification and is attached hereto.)

A. This page? (Indicating.)

BY MR. ARRAZOLO: Q. No.

That will be this page over here.

A. Okay

MR. MANTHEY: Let the record reflect that he is pointing to Paragraph 5 of the PMA, which is Exhibit 1.

* * *

[96]

Q. Yes.

A. — do we have in place?

Q. All right. What practices and procedures does Conoco have in place for ensuring that Section 4-H is complied with by marketers?

MR. MANTHEY: The same objection

It assumes facts not in evidence regarding ensuring such compliance.

A. We, to ensure compliance, nothing to ensure compliance.

To ensure image standards, we have image inspection programs in place

BY MR. ARRAZOLO: Q. All right. Describe the image inspection program.

A. The image inspection program is a part of the brand-image requirement.

It's a program that is administered by outside contract personnel on a twice a year basis to independently inspect all Conoco-branded locations, the retail and wholesale, relative to image requirements.

The feedback from that is provided to marketing.

[97]

Q. Do you have any knowledge as to which outside contract personnel is used by Conoco?

A. We have used different firms over the years.

Q. Which firms has Conoco used?

A. I do not know.

Q. All right. Do you have any knowledge as to the criteria that it tested in the course of an image inspection?

A. Are you saying do I know what they look for?

Q. Yes.

A. I have basic knowledge of what they look for, yes.

Q. And what is that knowledge?

A. The inspection, itself, is divided into several different aspects.

The first deals with brand-image requirements.

It primarily has to do with facia, signage, colors, island treatment. "Island" meaning the fuel center where the dispensers and pumps are.

It primarily has to do with those image-related requirements.

[98]

Then, there are additional points or areas that are checked for exterior appearance and interior appearance for cleanliness around restrooms and for customer service focus.

That pretty well, I think, cover the majority of the area, interior-exterior and island image.

Q. All right. Are there parts of the image inspection that deals specifically with Section 4.H.1.E. of the PMA?

A. There is.

Q. What is the point system for the image inspection, do you know?

A. Oh, the total points?

Q. Yes.

A. One hundred.

Q. What score does a location have to obtain in order to pass an image inspection?

A. Eighty-vie or better.

With no branded failures.

Q. And what do you mean by "branded failures?

A. Island image.

Q. And what are the specific factors that are inspected for pertain to island image?

* * *